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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-498

MANUEL ALFONSO RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
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OCTOBER TERM, 1977
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: *The Honorable Chief Justice, and the Honorable Associates Justices of the Supreme Court of the United States:*

The petitioner, Manuel Alfonso Rodriguez, by Charles Sutton, his attorney, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit upon the grounds set forth below.

It is respectfully suggested that the decision and opinion of the Court of Appeals in this case, Slip Op., May 11, 1977, pp. 3429-3435, is a grave departure from and is inconsistent with the decisions of this Court as herein set forth. It is respectfully suggested that the decision of the Court of Appeals fails to apply the decisions of this Court

set forth in *Mooney v. Holohan*, 294 U.S. 103; *Miller v. Pate*, 386 U.S. 1 (1967); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); and *United States v. Agurs*, 427 U.S. 97 (1976).

The petitioner was indicted, tried and convicted upon false evidence and perjured testimony known to be such by the government in violation of petitioner's Constitutional rights under the Fifth and Sixth Amendments.

The Court of Appeals decision in this case, contravenes the Sixth Amendment, Rule 7, Fed. Rules Cr. Proc. 28 U.S.C. and the decisions of this Court and is in conflict with its own prior decisions and with the decisions of the Courts of Appeals of the other circuits, which require that an indictment must allege a "plain, concise and definite written statement of the essential facts constituting the offense charged . . . "

The decision of the Court of Appeals in this case has created a precedent that a court may construe the words of an indictment so as to find a covert and esoteric meaning therefor which fundamentally changes the facts alleged in the indictment and which fundamentally changes the theory of the indictment.

The decision of the Court of Appeals held that the words "*signed by Rodriguez*", and the words *bearing the signature of Rodriguez*" had a covert, esoteric and fundamentally different meaning from each other, notwithstanding that those two sets of words were words of common understanding which have meant the same thing from time immemorial, as set forth at pp. 31-34, *infra*. (Appendix pp. 5a-6a).

By that decision the Court of Appeals affirmed a judgment of conviction based on false evidence and perjured testimony.

STATEMENT PURSUANT TO U.S. SUPREME COURT RULE 23, 28 U.S.C.A.

The opinion delivered by the United States Court of Appeals for the Second Circuit in this case on May 11, 1977 was not officially reported. The copy of the opinion is set out in Appendix, pp. 1a-7a.

Jurisdiction of this Court is invoked on the ground that the judgment in question was based on an indictment returned against the petitioner in the United States District Court for the Southern District of New York which charged violations of federal criminal law, to wit: 18 U.S.C. 371, 18 U.S.C. Section 1001, and 18 U.S.C. Section 2.

The judgment of the Court of Appeals which is sought to be reviewed is dated May 11, 1977 and was entered May 11, 1977.

The order of the Court of Appeals denying the petitioner's application for rehearing is dated August 30, 1977 and was entered August 30, 1977.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254(1).

The questions presented for review are as follows:

(1) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law and to a fair trial when the government obtained his conviction under the indictment which charged him with conspiracy to file false documents with the United States Department of State and with the substantive count of filing on May 5, 1976 a false document with the said Department of State "bearing the signature of the defendant Manuel Alfonso Rodriguez", which signature was the only connection between petitioner Rodriguez and the crime charged, when

in fact the government knew at the time of the indictment that Miguel D. Celis (who had testified to the Grand Jury for the government) had forged the signature of Manuel Alfonso Rodriguez on that document and the government admitted to the Court of Appeals its said knowledge?

(2) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law and to a fair trial when the government wilfully and deliberately suppressed and concealed from the petitioner, his counsel, the Court, and jury, the fundamental and essential exculpatory evidence that Miguel D. Celis had forged the signature of Manuel Alfonso Rodriguez on the document dated April 22, 1976 which was filed on May 5, 1976 with the Department of State and which was the corpus of the crimes charged in Count 3, and an essential element of the crime charged in Count 1 of the indictment?

(3) Was the petitioner denied his Constitutional rights under the Fifth Amendment to due process of law when the government presented false evidence to the Grand Jury that the aforesaid document dated April 22, 1976 was a document "bearing the signature of defendant Manuel Alfonso Rodriguez", when in fact the government knew that Miguel D. Celis had forged the signature of Manuel Alfonso Rodriguez thereon?

(4) Was the petitioner denied his Constitutional rights under the Sixth Amendment to effective assistance of counsel by the failure of private counsel to present any defense of any kind, exemplified by the failure of the trial counsel even to object to the introduction in evidence of the document dated April 22, 1976 as "bearing the

signature of defendant Manuel Alfonso Rodriguez, failure to object to hearsay tape recordings in which Miguel D. Celis stated to government agent Kelly and defendants Geraldo and Michaelson that the said three (3) blank sheets of letterhead paper were signed by Manuel Alfonso Rodriguez, as to which Miguel D. Celis was not produced by the Government and did not testify, and to mountains of hearsay, double, and triple hearsay testimony, leading questions, etc., the failure of private trial counsel to conduct any discovery or other pre-trial counsel's statement or summation, among others in a similar vein, to wit: "you have to find the defendant guilty beyond a reasonable doubt" (T-832) and failure to investigate even the file in the case in the office of the Clerk of the District which, could have disclosed the admission by Miguel D. Celis that he had forged the name of petitioner to the false certificate which was charged against petitioner in Counts 1 and 3 of the indictment?

(5) Was the conviction of the petitioner obtained without sufficient evidence?

(6) Was the trial court's charge as to reasonable doubt reversible error?

(7) Did the trial court charge which included an instruction that the jury could convict Rodriguez if it found that he had "facilitated" the commission of the substantive crime charged in Count 3 of the indictment which is not an element of the statute in question, 18 U.S.C. Section 1001, deny Rodriguez a fair trial and was it reversible error?

(8) Did the prosecutor's statements to the jury deprive the petitioner of a fair trial and require reversal of the judgment of conviction?

(9) Were the petitioner's Constitutional rights under the Fourth, Fifth and Sixth Amendments violated by the introduction in evidence by the government of a videotape obtained by the staged, planned, focused interrogation of the petitioner who could neither speak nor understand English, at an isolated location in a room guarded by armed government agents from which the petitioner would not be allowed to leave against whom the full panoply of government was arrayed against him, including the United States Attorney and one or more of his assistants, to incriminate the petitioner?

(10) Was it reversible error to allow the government to introduce a "Bushmaster" machine gun in evidence which had no relevance to the indictment, and which was the prototype sample sub-machine gun in existence, no other such sub-machine guns having been manufactured, and whose real purpose was to create unfair prejudice against the petitioner?

(11) Was the petitioner denied his Constitutional rights under the Fifth and Sixth Amendments by the decision of the Court of Appeals that the government intended that the allegations set forth in Count 3 of the indictment, to wit, "bearing the signature of defendant Manuel Alfonso Rodriguez" meant "that Rodriguez' name on the certificate was there with his full knowledge and consent, but not as a result of his penmanship," when the words of the indictment made no such allegations of fact, when there was *no evidence* whatever presented at trial from any source that "Rodriguez' name on the certificate was there with his full knowledge and consent", and when it was found by the Court of Appeals that the petitioner did not sign that certificate and when it was

established before the Court of Appeals that to the knowledge of the government, existing prior to the return of the indictment, that Miguel D. Celis had forged the signature of petitioner on the certificate dated April 22, 1976, which is the subject of Count 3, which decision by the Court of Appeals fundamentally changed the essential facts alleged against the petitioner and upon which the petitioner was charged, tried and convicted?

(12) Was the petitioner denied his Constitutional rights under the Fifth and Sixth Amendments when the Government introduced hearsay testimony by government agent Kelly alleging that Miguel Celis told him that Manuel Alfonso Rodriguez had signed three (3) blank letterhead sheets of paper, one of which was later filled in by Miguel D. Celis and others and filed with the Department of State, and was the basis for Count 3 of the indictment, when the Government introduced tape recordings by Miguel D. Celis, in which Celis states that Rodriguez signed the said three (3) blank letterhead sheets of paper, and numerous other hearsay, double hearsay, and triple hearsay testimony as to what others said about Rodriguez, when Miguel D. Celis did not testify, and none of the other hearsay declarants testified, and none were subject to cross-examination?

The Constitutional provisions involved in this case are:

(a) *Fifth Amendment:* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor

shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ." U.S.C.A. Const. Amend. 5.

(b) *Sixth Amendment:* "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defense." U.S.C.A. Const. Amend. 6.

(c) *Fourth Amendment:* "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Statutes involved in this case are:

(a) *18 U.S.C. Section 2:* "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

(b) *18 U.S.C. Section 371:* "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum provided for such misdemeanor."

(c) *18 U.S.C. Section 1001:* "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

The Federal Rules of Criminal Procedure involved in this case are:

(a) Fed. Rules Cr. Proc., Rule 7, 28 U.S.C.A.: "(c) Nature and Contents. The Indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

STATEMENT OF THE CASE AND FACTS

The petitioner was at all times herein since June 1, 1972 the Chief of Staff of the Armed Forces of El Salvador. He came for the first time to the United States on May 13, 1976 at New Orleans, Louisiana, on an official mission for his government. He did not speak or understand English.

The petitioner was arrested on May 16, 1976 in Westchester County, New York. He has been continuously confined to jail since May 16, 1976.

The petitioner was indicted on May 25, 1976 in the United States District Court for the Southern District of New York under indictment number 76 CR 503. The indictment alleged four (4) counts against the petitioner. The

trial court dismissed Counts 2 and 4 on defendant's motion at the end of the government's case. Counts 1 and 3 are as follows:

"1. At all times material to this Indictment, the defendant, DOMINICK F. CAGIANESE, was an American citizen employed as the Director of Aeronautics, Mott Haven Industries, Ltd., 439 Bruckner Boulevard, Bronx, New York.

2. At all times material to this Indictment, the defendant, FRANK G. ALVAREZ, was an American citizen employed by Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, as its Marketing Director for Latin America.

3. At all times material to this Indictment, the defendant, IRWIN TOBOGMAN, was an American citizen and self-employed businessman conducting his business affairs from his residence located at 415 East 52 Street, New York, New York.

4. At all times material to this Indictment, the defendant, RAYMOND GERALDO, was a self-employed businessman and an American citizen.

5. At all times material to this Indictment, the defendant, ROBERT MICHAELSON, was an American citizen employed as the President of Wittington Imports, Ltd., Great Neck, New York.

6. At all times material to this Indictment, the defendant, MIGUEL D. CELIS, was a self-employed businessman residing in San Salvador, El Salvador, Central America and was a citizen of that country.

7. At all times material to this Indictment, the defendant, MANUEL ALFONSO RODRIGUEZ, was the Chief of Staff of the Armed Forces of El Salvador, Central America, and a citizen of that country.

COUNT ONE

The Grand Jury charges:

I. THE CONSPIRACY

8. From on or about January 1, 1976 and continuously thereafter up to and including May 15, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOGMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS and MANUEL ALFONSO RODRIGUEZ, the defendants, Howard Peters named herein as an unindicted co-conspirator but not as a defense, and others to the Grand Jury unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 26, United States Code, Sections 5811, 5812, 5861(d) and (e) (Title II of the Gun Control Act of 1968) and of Title 18, United States Code, Sections 1001 and 2.

II. OBJECTIVES OF THE CONSPIRACY

9. The objective of the conspiracy was to secretly sell weapons, munitions and other implements of war to buyers in the United States in a manner designed and intended to conceal from the United States Department of State and the United States Department of the Treasury the true identities of the buyers.

10. In order to attain their objective, the members of the conspiracy also agreed to seek to prepare and file with the United States Department of State certain false and fraudulent documents intended to create the false and misleading appearance that certain weapons and

munitions were to be purchased by foreign countries for the exclusive use of their armed forces in their national defense.

III. MEANS OF THE CONSPIRACY

11. Among the means by which the defendants would and di carry out the said conspiracy were the following:

(a) Between, on or about March 20, 1976 and May 15, 1976, the defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents including: (i) an official United States Department of State Form DSP-5, entitled "Application/License for Permanent Export of Unclassified Implements of War .'.'."; (ii) a certificate, dated April 22, 1976, bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition, dated May 3, 1976, signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83, entitled "Consignee Purchaser Transaction Statement" signed by the defendant Colonel Manuel Alfonso Rodriguez and bearing his official government seal.

(b) On or about May 5, 1976, the defendants filed, facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to in Subparagraphs 11(a)(i), and (iii) above.

OVERT ACTS

In furtherance of said conspiracy and in order to accomplish its objectives, the defendants committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about March 20, 1976 the defendant ROBERT MICHAELSON travelled to the Pepper Tree Restaurant, Mt. Kisco, New York in order to meet and negotiate with prospective buyers of weapons, munitions and other implements of war.

2. On or about March 21, 1976 the defendant RAYMOND GERALDO travelled to the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning the sale of certain weapons, munitions and other implements of war.

3. On or about March 22, 1977 the defendants DOMINICK CAGLIANESE and RAYMOND GERALDO met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning arrangements to obtain from an official of a foreign government false and fraudulent documents to be filed with the United States Department of State.

4. On or about March 27, 1976, March 29, 1976 and April 14, 1976, at the Pepper Tree Restaurant, Mt. Kisco, New York, the defendants DOMINICK CAGIANESE, FRANK G. ALVAREZ, RAYMOND GERALDO and ROBERT MICHAELSON had conversations concerning an initial sale of 10,000 submachine guns for a price of $2,800,000.

5. On or about April 1, 1976, the defendant DOMINICK CAGIANESE travelled to the vicinity of Winston-Salem, North Carolina in order to observe and participate in a test firing demonstration of a "Bushmaster" submachine gun.

6. In or about April 1976, the defendant RAYMOND GERALDO travelled to Central America for the purpose of obtaining a false and

fraudulent certificate from an official of a Central American country.

7. On or about May 2, 1976, the defendants RAYMOND GERALDO, ROBERT MICHAELSON, DOMINICK CAGIANESE and MIGUEL D. CELIS met at the Pepper Tree Restaurant, Mt. Kisco, New York, and had a conversation concerning a cash payment to be made to the defendant MANUEL ALFONSO RODRIGUEZ in return for the defendant RODRIGUEZ facilitating the filing of false and fraudulent documents with the United States Department of State.

8. On or about May 3, 1976 the defendants FRANK G. ALVAREZ, MIGUEL D. CELIS and RAYMOND GERALDO met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York and had a conversation concerning the preparation of false and fraudulent documents to be filed with the, United States Department of State.

9. On or about May 4, 1976, the defendants FRANK G. ALVAREZ, MIGUEL D. CELIS and RAYMOND GERALDO met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York, and had a further conversation concerning arrangements to file certain false and fraudulent documents with the United States Department of State.

10. on or about May 5, 1976 the defendant FRANK G. ALVAREZ directed one of his employees to deliver certain false and fraudulent documents to the United States Department of State, Washington, D.C.

11. On or about May 14, 1976 the defendant FRANK G. ALVAREZ placed a telephone call

from the offices of Mott Haven Industries, Ltd. to El Salvador, Central America.

12. On or about May 14, 1976, the defendant FRANK G. ALVAREZ placed a telephone call from the offices of Mott Haven Industries, Ltd., to the United States Department of State, Washington, D.C.

13. On or about May 15, 1976, the defendants MANUEL ALFONSO RODRIGUEZ, MIGUEL D. CELIS, RAYMOND GERALDO, IRWIN TOBOOMAN, ROBERT MICHAELSON and FRANK G. ALVAREZ met at the Holiday Inn, Mt. Kisco, New York and discussed their plan to sell weapons, munitions and other implements of war to buyers in the United States.

14. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants MANUEL ALFONSO RODRIGUEZ and MIGUEL D. CELIS received the approximate sum of $75,000 in cash for having provided, and having agreed to provide certain false and fraudulent documents filed and to be filed with the United States Department of State.

15. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants ROBERT MICHAELSON and IRWIN TOBOOMAN received the approximate sum of $25,000 in cash for having facilitated the preparation of false and fraudulent documents filed and to be filed with the United States Department of State. (Title 18, United States Code, Section 371).

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COUNT THREE

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOGMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, willfully and knowingly did make, facilitate, the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a certificate dated April 22, 1976 on the official letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A.", bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 "Bushmaster" submachine guns and 1.5 million rounds of ammunition for said submachine guns were to be used by the armed forces of El Salvador and would not be re-exported to any third party whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns and the 1.5 million rounds of ammunition were to be sold to individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)"

Trial was held before District Judge Kevin T. Duffy, and a jury on September 20, 21, 23, 24, 27, 28, 29, 30; October 1, 5, 8, 1976. The trial court, at the conclusion of the prosecution's case and after both sides had rested, on

motion, dismissed Count 1 and 4 as to RODRIGUEZ (724).*

On November 23, 1976, the trial judge sentenced RODRIGUEZ to a jail term of five (5) years on each count to be served consecutively for a total jail term of ten (10) years.

Count 1 charged RODRIGUEZ and others with conspiracy to violate the Gun Control Act of 1968, 28 U.S.C. Sections 5811, 5812, 5861(d), 5861(e), 18 U.S.C. Section 1001 and 18 U.S.C. Section 2, *supra*.

Count 3 charged RODRIGUEZ with the substantive count of violation of 18 U.S.C. Section 1001 and 18 U.S.C. Section 2, *supra*.

The government's case was presented, chiefly through government agent Joseph Kelly, who was employed by the Alcohol, Tobacco, and Firearms Bureau of the Department of Treasury (175). The case against Rodriguez was presented by the hearsay testimony of Agent Kelly who testified to what others said about Rodriguez and by audio tapes of the hearsay of those declarants who were not in court and who were not subject to cross-examination.

The government indicted Rodriguez, constructed its case against him, tried him, and obtained his conviction under Count 1 and Count 3 upon false evidence and perjured testimony known to be such by the government, that Rodriguez had signed the document described in Count 3, and also in Count 1, which was introduced in evidence as Government Exhibit 31 (GX 31).

Prior to the indictment herein, the government knew that the petitioner had not signed GX 31 and that GX 31 did not bear his signature and that Miguel D. Celis had forged the petitioner's signature upon that document.

References in parenthesis are to trial transcript.

As of May 26, 1976 the government knew that Miguel D. Celis, on May 3, 1976 in New York, had forged the signature of Rodriguez on to three (3) blank sheets of paper bearing the apparent letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A." which is translated as: Chief of Staff of the Armed Forces, San Salvador, El Salvador, Central America, that one of these said three (3) blank sheets with the forged signature of Rodriguez was later, on May 3, or May 4, 1976, typed up and filled up by Miguel D. Celis, and others, into what became the document dated April 22, 1976 described in Count 3 and introduced in evidence as Government Exhibit 31 (GX 31), and that the other two (2) blank sheets of paper with the forged signature of Rodriguez were introduced in evidence by the government as Government Exhibits 11, 15, and 19 (GX 11, GX 15, GX 15) which appear in reduced form at Appendix pp. 21a-24a.

The documentary proof establishing the facts of this forgery by Miguel Celis and of the government's knowledge of this forgery were found in the file of this case in the Office of the Clerk of the United States District Court for the Southern District of New York. It had a clerk's stamp noting that it had been filed August 18, 1976. Appendix pp. 12a-20a.

After the trial, and judgment, Rodriguez retained present counsel to prosecute his appeal to the Court of Appeals. Present counsel in reviewing the file in this case at United States District Court found the said plea minutes of Miguel D. Celis dated May 26, 1976 had before District Judge Charles L. Brieant. Those plea minutes showed that the United States Attorney for the Southern District of New York was represented there by two Assistant United States Attorneys: Robert Gold, Esq. and James Moss, Esq. Both of these attorneys were present at the trial of Rodriguez,

which was prosecuted by United States Attorney Robert B. Fiske, Jr., and were actively engaged at that trial on behalf of the government, at the trial transcript shows.

The said plea minutes of Miguel D. Celis showed that Miguel D. Celis had traced the signature of Rodriguez on GX 31, the document which was the basis for Count 3 of the indictment and which formed an important part of Count 1 of the indictment. Those plea minutes proved that Celis had forged the signature of Rodriguez on GX 31 on GX 11, 15 and 19, and that Rodriguez had not signed GX 31, and that it did not bear Rodriguez' signature. It proved also that the government knew these facts prior to trial. The facts are that the government knew these facts prior to the return of the indictment. The indictment was returned on May 25, 1976.

In response to Rodriguez' charge in his brief to the Court of Appeals that the government had presented false evidence to the Grand Jury, the government disclosed in a footnote to its brief at page 14 that Miguel D. Celis had testified before the Grand Jury which had returned this indictment.

At the plea hearing of Miguel D. Celis on May 26, 1976 District Judge Brieant asked Miguel D. Celis the following questions, among others, and Miguel D. Celis responded, as follows:

"Q. Have you gone over Count 3 with your attorney, Mr. Leisure?

A. Yes.

Q. Has he explained to you what the charge is against you on Count 3?

A. Yes, sir.

Q. Do you fully understand it?

A. I do, Your Honor.

******

Q. Are you ready to plead to Count 3?

A. Yes, Your Honor.

******

Clerk: Do you wish to plead guilty to Count 3?
The Defendant: Yes.

* * * * * *

The Court: Does the Government represent that it has a prima facie case as to Count 3?
Mr. Gold: Yes, Your Honor.

* * * * * *

Q. Tell me what you did with respect to Count 3 here.

A. Concerning this page, Your Honor (indicating)?

Mr. Leisure: The Defendant Celis is indicating a Grand Jury Exhibit marked as Exhibit No. 5, which is referred to in Count 3. It is a single-page document, and that is what he is referring to, Your Honor.

Q. What did you do with respect to that document?

A. I brought it to the United States, Your Honor, and I helped to trace the signature, and I helped in filling it out.

The Court: Hand that to the Clerk.

Q. Did you do that in order to assist somebody in obtaining certain firearms?

A. Yes, sir.

Q. Did you do that intentionally and knowingly?

A. Yes, Your Honor.

Q. You knew it was wrong?

A. I knew that the weapons would never go to El Salvador, Your Honor.

Q. You knew that the certificate was fraudulent?

A. Yes, Your Honor.

The Court: Is there any further inquiry which counsel believes the Court should make before entering the plea?

Mr. Gold: No, Your Honor.

The Court: I will accept your plea. . . ."

Notwithstanding that the government knew since prior to the return of this indictment, that Miguel D. Celis had forged Rodriguez' signature onto three (3) blank sheets of letterhead paper as aforesaid, notwithstanding that the government knew that Miguel D. Celis and others later typed up those forged sheets of said paper bearing the letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A." onto the very document which Count 3 of the indictment charged bore "the signature of defendant Manuel Rodriguez", and notwithstanding that the government knew that Rodriguez did not sign that document charged in Count 3 and that it did not bear his signature, the government nonetheless concealed and suppressed these essential exculpatory facts from all defense counsel, from the court, and from the jury, and intentionally misrepresented the facts, and misled all defense counsel, the court and the jury.

The government deliberately and aggressively presented false evidence and perjured testimony to the court and jury that Rodriguez signed the document (GX 31) described in the indictment and that it bore Rodriguez' signature, as well as GX 11, 15 and 19.

The government prosecutor explicitly stated to the jury in his opening statement that Rodriguez "*signed*" *three* blank sheets of paper bearing the letterhead Estado Mayor General de La of the Fuerza Armada of the Republic of El Salvador:

> (16)* "*On May 2,* Mr. Geraldo returned to the United States. He attended a meeting at which were present Mr. Michaelson as well as Jo Jo (the Government Agent Kelly), Mr. Cagianese and *Mr. Michaelson brought with him to that meeting two men from El Salvador, one the defendant Miguel Celis.* . . . the business associate of Colonel

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Numbers in parenthesis is a reference to pages in the trial transcript.

Rodriguez, and the other man named Suarez, who plays no further role in this case. (17). *These two men brought with them a blank piece of paper on the letterhead of Colonel Rodriguez, bearing the signature of Colonel Manuel Rodriguez.* The whole letter was blank in between the letterhead and *the signature.*

Mr. Geraldo (sic) and Mr. Celis explained that it had been done that way so that the people here who were familiar with what the State Department needed could fill in the language that would provide the end use certificate. That was done. The document was actually prepared. . . ." (17). (Matter in parenthesis and underscoring added).

The government prosecutor emphasized to the jury that the so-called end use certificate (GX 31) was signed by Rodriguez, that it was "under Colonel Rodrigues' signature" (17)

> ". . . Colonel Rodriguez is running a big risk, *signing a document* like that . . . .(18); . . . That Colonel Rodriguez *in fact* hasprovided this certificate (19) . . . "; On May 5, the documents are sent to the State Department. . . . They include this document that was prepared by Mr. Geraldo in Mr. Michaelson's office, *signed by Colonel Rodriguez,* which states that El Salvador wants these 10,000 submachine guns for its national defense. . . . Those three documents are in fact filed with the State Department." (19). (Italics added).

The government prosecutor deliberately elicited testimony from his witness Agent Kelly that *Rodriguez "signed"* the so-called end use certificate through hearsay testimony that Miguel Celis told him (Agent Kelly) on May 2, 1976 that the three (3) blank letterhead sheets of paper, one of which was later transformed by Celis and others into the document described in Count 3:

> ". . . was *signed* with a signature. (253) . . . that Colonel Rodriguez *had signed* the document . . ." (254). (Italics added).

The prosecutor introduced into evidence and played to the jury tape recordings of hearsay conversations and declarations by and to Agent Kelly that Rodriguez *signed* the document described in Count 3 of the indictment, to wit:

> Transcriptions of Nagra Tape Recordings made by Government Agent Joseph Kelly furnished by the Government as 3500 material heard by Jury and used by Jury

May 2, 1976 — Page 6

> *"MICHAELSON: I know just the type this guy is, and he is a doer. I mean, if he says he'll do it, he will do it. And he has done things for me. Okay. Which are fantastic. I'm very happy. I met with these guys today. They got the documents. I've seen them. He hasn't seen them. I've seen them. Everything. There is only one signature in Washington . . . You bring the document to Washington. Washington checks to see the signature. There is only one man who can sign arms, in San Salvador, this man.*
>
> *STAGG: [062] Oh, is this . . . San Salvador*
>
> *KELLY: And, and this signature is on the papers.*
>
> *MICHAELSON: It is the only signature. Any other signature [2nd voice maid], Washington would have to say, wait a minute, I've got to check this out . . ."*

MAY 2, 1976 — Page 7

> "MICHAELSON: Here are the documents. It's *signed,* here's what it is . . . you got the seal, the sign, everything is *by the man, the colonel,* and we type in what we want, you want to type in on the letter.

GERALDO: Couldn't get a better deal than that.

GERALDO: Nothing better than that. Could you, eh, can't ruin O.K.

CAGIANESE: You can't beat that."

Transcripts of Nagra Tape Recordings made by Government Agent Joseph Kelly furnished by the Government as 3500 material heard by Jury and used by Jury

MAY 2, 1976 — Page 53

KELLY: While we're, while we're standing here, we're relaxed, these guys come, these Latins come up, let's be cool with them.

MICHAELSON: Yeah.

KELLY: Is he the guy who signed it? He's not, *'cause Rodriguez signed.*

Transcriptions of Nagra Tape Recordings made by Government Agent Joseph Kelly furnished by the Government as 3500 material heard by Jury and used by Jury

MAY 2, 1976 — Page 152

CAGIANESE: How many of these can we have when, tomorrow.

CELIS: Well, I have some blanks and I have three these *signed.*

CAGIANESE: *Three signed* and some blanks, good.

GERALDO: Well, you can fil, the order you want, can't you?

MAY 2, 1976 — Page 162

CAGIANESE: How much money you need?

CELIS: Ah, this man who *signed it, Colonel Rodriguez,* he is the first director of this corporation.

Transcripts of Nagra Tape Recordings made by Government Agent Joseph Kelly furnished by the Government as 3500 material heard by Jury and used by Jury

MAY 3, 1976 — Page 4 : A.M.

ALVAREZ: They just say for the use of the armed forces . . . You know . . . Now who are these people who are *signing the letter.*

KELLY: *Colonel Rodriguez,* he's alleged to be the Chairman of the Joint Chiefs of Staff . . .

STAGG: The Boss.

KELLY: For San Salvador, El Salvador.

ALVAREZ: He will be signing all the "End User" Certificates.

STAGG: He signed them?

KELLY: He's already signed them.

ALVAREZ: Alright, so that . . . .

STAGG: Dominick had a letter from these guys, just *his signature* on the bottom."

MAY 3, 1976 — Page 43 : 5:35 P.M.

MICHAELSON: The "end use".

KELLY: The thing was already there.

MICHAELSON: The one that was ready, it was *signed by Rodriguez,* and empty in the middle."

The government prosecutor elicited testimony from the court translator, in transling the Government Exhibit 15, which was one form of the final end-use certificate described in Count 3, that it was signed by Rodriguez:

"Mr. Hoffman: It has an *official letterhead . . . Signed by Manuel Alfonso Rodriguez . . .*" (271-272). (Italics added).

The government prosecutor elicited more testimony from Agent Kelly that Rodriguez *signed* that document described in Count 3:

". . . I told Mr. Cagianese that *Colonel Rodriguez* was to come to New York on May 15 and at that time we were going to pay him $75,000 *for his furnishing us with the end use certificate . . .* (298-299). *Miguel Celis handed — showed us three copies of it — three original copies* of the blank form *signed by*, according to him, Colonel Rodriguez (484) . . .

The Court: Whether Colonel Rodriguez had *signed* the document. Did you know?

The Witness (Kelly): I was told *he had signed it* . . . (486)

******

A. Mr. Michaelson told us that *the Colonel had signed the certificate for us* . . . (571)." (Underscoring added).

After Rodriguez was arrested on May 16, 1976, he was interrogated by one or more Assistant United States Attorneys, after he had demanded the right to telephone to his President, Minister of Defense, or the Chief of the Joint Chiefs of Staff of the United States Armed Forces, which request was not granted. The Assistant United States Attorney wrote down what was alleged to be Rodriguez' post-arrest statement.

The alleged post-arrest statement of Rodriguez dated May 16, 1976 was introduced in evidence by the government with the consent of Rodriguez' trial counsel. In that alleged post-arrest statement appeared the following:

"Q. Did you ever give anyone your signature on a blank piece of paper.

A. no."

During cross-examination, Agent Kelly disclosed that he had heard that Rodriguez had not signed the document described in the indictment, which charged that it bore the signature of Rodriguez. Agent Kelly however did not disclose that Celis had forged Rodriguez' signature on that document.

The prosecutor sought a chamber's conference. At the chambers conference the prosecutor concealed the facts from the court and counsel.

The prosecutor instead of informing them of the facts which he knew, misled them. The prosecutor declared to the court in chambers:

"Mr. Fiske: It seems to me the fair way to straighten this out now is to let me put it back to Kelly that when he said—*because this is the only way we can correct the record fairly at this time*—is when he said he heard that Colonel Rodriguez had not signed the end use certificate, *he heard that that is what the Colonel himself said. I think that puts it right in the context . . .* " (588-589). (Italics added).

The Government Prosecutor repeated that misinformation to the court again at T627, and again at T630-631; and again at T.719, at the end of the trial, to wit:

" . . . It seems to me, Your Honor is entitled to take his denial with respect to his signature in the context of other false exculpatory statements that are contained in that document." (Referring to Rodriguez' alleged post-arrest statement) (719).

The Government Prosecutor elicited testimony from Government Witness Timothy M. Gomez, who had absolutely no knowledge of that fact, that the "signature" on

the document described in Count 3 was *signed by Rodriguez* (608):

> "Q. Was there a signature line on that end use certificate?
>
> A. Yes.
>
> Q. . . . Was there a signature on the document?
>
> A. Yes.
>
> Q. Was there a description of *who the signatory* was?
>
> A. Yes.
>
> Q. Do you recall what that description said?
>
> A. Well, I believe it was the Colonel—I don't remember his full name—but a Colonel Rodriguez and I think it had his title there . . . " (608) (Underscoring added).

The prosecutor knew that Gomez had no knowledge whatever that the signature which appeared on the document, GX31, was that of Rodriguez. The prosecutor intentionally elicited Gomez' testimony, knowing that Gomez was testifying only from the fact that he had read the typing underneath the signature and that the typing stated "Manuel Alfonso Rodriguez, Colonel, . . .", as the testimony shows.

The prosecutor submitted Government Jury Charge Request No. 29 to the trial court, which expressly stated that the 'end use certificate' was a document "bearing the signature of Manuel Alfonso Rodriguez". The Government Request No. 29 stated as follows:

> "*REQUEST NO. 29*
>
> *Substantive Counts: First Element*
>
> The first element the government must prove beyond a reasonable doubt is that on or about May 5, 1976, the defendants made, facilitated or caused to be made certain statements. With respect to Count Two, the statement which the government contends was made is Government's Exhibit 30, a Form DSP-5, 'Application/License' for the export of the 10,000 submachine guns. *With respect to Count Three, the statement which the Government contends was made is Government's Exhibit 31, an 'end-user' certificate, typed in Spanish and bearing the signature of Manuel Alfonso Rodriguez.* (Underscoring added).

The trial court modified the language of that government's request to charge so that the final portion of the above quoted paragraph was changed to:

> "bearing a signature *which purported to be that* of Manuel Alfonso Rodriguez . . . " (894)

That charge put the issue clearly to the jury whether the signature on the document was the genuine signature of Rodriguez.

The trial court charged the jury that

> "In order to find . . . the defendant Rodriguez guilty on Count 3, you must be satisfied beyond a reasonable doubt of four things: First, that on or about the dates charged, the defendants, or the defendant that you are considering at the time made or *facilitated* the making of and caused to be made certain statements or representations. Two, that the representations or statements were false, fictitious or fraudulent. Three, that the defendant you are considering knew that the statements or representations were false, fictitious or fraudulent. Four, that the statements or representations were made within the jurisdiction of a department or agency of the United States. I charge you as a matter of law that the United States Department of State is a department, as that word is used in this case, a department of the United States.
>
> The first element that the government must

prove is that the defendant that you are considering made, *facilitated* or caused to be made certain statements.

. . . With respect to Court 3, the statement that the government contends was false was Government's Exhibit 31, end-use certificate, typed in Spanish, and *bearing a signature which purported to be that of Manuel Alfonso Rodriguez* . . . Secondly, the government must show that the statements that were made facilitated or caused to be made, were false, fictitious or fraudulent. The government contends that the three statements reflected in these counts were false because they represent that the 10,000 Bushmaster submachine guns and 1.5 million rounds of ammunition were to be sold to and used by the Armed Forces of El Salvador, when, it is alleged, the submachine guns and ammunition were going to be sold to and used by purchasers in the United States. (893-895)". (Italics added)

In its brief at page 14 to the Court of Appeals, the government admitted that Rodriguez did not sign any of the government exhibits, GX 11, 15, 19, and 31, which the government had offered into evidence at the trial. By those exhibits the government had represented to the court and jury that they were signed by Rodriguez and bore his signature. Those representations by the government were explicit not only as shown by the foregoing, but also by the fact of each exhibit GX 15, 19, and 31 wherein the signature was labelled by the typing as being that of "Manuel Alfonso Rodriguez, Colonel de Artilleria, D.E.M., Jefe del E.M.G.F.A." In its brief to the Court of Appeals, the government repeated Rodriguez' charge that the government knew at all times at issue that Miguel D. Celis had forged Rodriguez' signature onto those government exhibits, GX 11, 15, 19 and 31, and offered no denial. Notwithstanding, the government in its brief at page 8, in alleging the facts of the case, persisted in making the false statement to the court that the document described in Count 3 was "*Rodriguez' signature*", to wit:

> "On May 3, 1976 and May 4, 1976, Geraldo and Celis met with defendant Frank Alvarez, in the latter's office. Alvarez dictated to Geraldo a Spanish text for an end use certificate, which was then typed above *Rodriguez' signature* on one of the pieces of letterhead that had been supplied by Celis. The completed document (GX31) represented in Spanish that 10,000 Bushmaster guns and 1.5 million rounds of ammunition were being purchased by El Salvador for the exclusive use of its armed forces. (Tr. 263-4, 271-2, 605-9) . . . On May 5, 1976, at the press direction of Defendant Alvarez, Timothy Gomez filed the completed end use certificate, the purchase order and DSP-5 application form at the State Department's Office of Munitions and Control, in Arlington, Virginia." (Italics added.)

This Court in *Telegraph Co. v. Davenport*, 97 U.S.369, 373 (1873) eloquently stated " . . . no number of adjudications can add to the force of a simple statement of facts." And so it is in this case.

Rodriguez was indicted, tried, and convicted by the knowing use by the government of false evidence and perjured testimony.

The only evidence against Rodriguez as to Count 3 was the false evidence and perjured testimony that Rodriguez had signed the document described in Count 3, namely GX31, and that it bore his signature.

The Court of Appeals in this case, Slip Op. dated May 11, 1977, pp. 3433-3434, found the principal support for its decision affirming the judgment from the face of the in-

dictment. There the Court of Appeals found that the use of different words in different parts of the indictment, namely "signed by . . . Rodriguez" and "bearing the signature of . . . Rodriguez" had a covert and esoteric meaning on their face.

The Court of Appeals stated that the words "signed by . . . Rodriguez" meant "as a result of his penmanship", whereas, the words "bearing the signature of . . . Rodriguez" meant that "Rodriguez' name (sic) on the certificate was there with his knowledge and authorization, but not as a result of his penmanship. This was the nub of the difference between the certificate *'bearing the signature'* of Rodriguez and the Form DSP-83 'signed' by him." (Matter in parenthesis added).

The short answer to the suggestion of the Court of Appeals is that the covert and esoteric meaning of these words in the indictment, which the Court of Appeals declared to find, was not the meaning placed on them by the United States Attorney, as shown above. The transcript clearly established that the United States Attorney had indicted, tried, and convicted Rodriguez on the specific charge and specific claim of facts that Rodriguez had personally *signed* his name as a result of his penmanship upon three (3) blank sheets of paper bearing the letterhead of the Estato Mayor General de la Fuerza Armada, San Salvador, El Salvador, E.C.A.

At no time and at no place, not in the indictment, not in any bill of particulars, not in open court, not to the trial court, not to any defense counsel anytime, and not to the jury, did the United States Attorney, or any of his assistants, or representatives, or anyone else from the government, disclose, state, declare or reveal the essential facts that in New York on or about May 3, 1976 Miguel D. Celis *traced the signature of Rodriguez* upon the said three (3) blank sheets of paper bearing the letterhead of the

Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, C.A. One of those three (3) blank forged letterhead papers was later filled up by typing on May 3-4, 1976 in New York by that same Miguel D. Celis into what was described in Count 3 of the indictment as the "certificate dated April 22, 1976 on the official letterhead of the 'Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A.' *bearing the signature of the defendant Manuel Alfonso Rodriguez . . . ,*" which was introduced in evidence by the government as Government Exhibit 31 (GX 31). (Italics added)

This Court in *McGarrahan v. Mining Co.*, 96 U.S. 316, 320-322 (1877) used the words "Signature" and "signed by" interchangeably as having the same meaning and construction.

This Court in *White v. Van Horn* 159 U.S. 3, 13-18 (1895) showed that "Signed by" and "signature" had the same meaning and were used interchangeably. The word "signature" signifies a person's genuine signature (whether) produced by the pen . . . (or) when the signature . . . is impressed by means of a plate or other device representing his genuine signature." *Benson v. Mahon*, 127 U.S. 457, 467 (1887). (Matter in parenthesis added).

It may properly be said in this case as to the words "signed by" and "bearing the signature of", as it was said by this Court in *United States v. Bhagat Singh Thind*. 261 U.S. 206, 208-210 (1922) as to the words there construed, that "The words . . . are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken." *Webster's New World Dictionary of the American Language, Modern Desk Edition*, p. 438, defines the word *signature* as follows: "1. a person's name written by himself. 2. the act of signing one's name," and defines the word *sign* as: " . . . v.t. 1. to write (one's name) . . . v.i. to write one's signature."

This Court held in *Gilbert v. United States*, 370 U.S. 650, 658 (1961) that "where the falsity lies . . . in the genuineness of execution" it is forgery.

This Court in *Benson v. Mahon*, 127 U.S. 457, 466-469 (1887) held that the crime of forgery may be committed by various means, including printing, or any other device, as well as by writing with a pen. The nature of the crime is not changed by the means used to perpetrate it. This Court stated: "Mr. Bishop in the second volume of his work on criminal law, discusses the subject with his usual philosophical acumen. He says: 'Section 525. Looking at the writing as a representation addressed to the eye, reason teaches us that, whether it is made with a brush, with printer's type and ink, with any other instrument, or by any other device whatever—whether it is in characters which stand for words or in characters which stand for ideas, in the English language, or in any other language—is quite immaterial, provided the representation conveys to any mind the substance of what the law requires to constitute the writing whereof forgery may be committed. This statement of the doctrine is in broader terms than one to be found in the books, yet there is no decision contrary to what is thus said; and beyond doubt the tribunals will hold the law as thus stated whenever the occasion requires.' . . . This author also quotes from the Fifth Report of the English Criminal Law Commission, made in 1840, p. 68 et seq., in which is found the following language, speaking of forgery:

> "The offense extends to every writing used for the purpose of authentication . . . The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible mark of distinction by which the truth of any fact is authenticated, or the quality of genuiness is warranted, and consequently, where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due . . ." *Benson v. Mahon*, 127 U.S. 457, 466-469 (1887).

It is a fundamentally different charge by the indictment that the Court of Appeals suggests by its declaration of the existence of such a radical distinction between those similar words, "signed by" and "bearing the signature of".

The indictment did not charge that Celis signed Rodriguez' name to the blank sheet of letterhead paper with the authority, knowledge and consent of Rodriguez. The indictment charged that the certificate dated April 22, 1976 as fully typed up was the certificate "*bearing the signature of defendant Manuel Alfonso Rodriguez.*" Furthermore, the government totally concealed and suppressed the fact that Celis had forged Rodriguez' signature.

It is notable that the Court of Appeals in its decision in this case, Slip Op. May 11, 1977, pp. 3429-3435, did not address any of the issues presented by the government's use of false evidence and perjured testimony, to the Grand Jury and to the petit jury, and by the government's wilful suppression of the fundamental and essential exculpatory evidence that Miguel D. Celis forged the signature of Rodriguez on blank sheets of letterhead paper, as aforesaid, which were introduced into evidence as Government Exhibits 11, 15, 19, and 31, and which as to GX31, was the very subject of Count 3 of the indictment charged against Rodriguez as "*bearing the signature of defendant Manuel Alfonso Rodriguez.*"

POINT I

THE GOVERNMENT DEPRIVED RODRIGUEZ OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL BY THE KNOWING USE OF FALSE EVIDENCE AND PERJURED TESTIMONY.

This court in *Miller v. Pate*, 386 U.S. 1, 7 (1967) held that:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 ALR 406. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 SCL 1173; Pyle v. Kansas, 317 U.S. 213, 87 L. Ed. 214, 635 S. Ct. 177; cf. Alcorta v. Texas, 355 U.S. 28, 2 L Ed. 2d 9, 78 S Ct. 103. There can be no retreat from that principle here.' "

Needless to say, that fundamental principle applies to convictions so obtained in federal courts, through the Fifth Amendment. *Giglio v. United States*, 405 U.S. 150 (1972)

The principle of law is well established that a conviction obtained by the prosecution through the knowing use of false and perjured testimony cannot be permitted to stand even though the false evidence was not solicited by the prosecution where no effort was made to correct it after discovery. *United States v. Wilkins*, 326 F. 2d 135 (2d Cir. 1964).

" . . . Our cases establish that in cases of deliberate suppression, 'prophylactic considerations' designed to

deter future prosecutorial misconduct are of overriding importance. Grant v. Alldredge, 498 F. 2d 376, at 381; United States v. Pfingst, 490 F. 2d 262, 277 (2d Cir. 1972).; United States v. Keogh, supra, 391 F. 2d 138, 147-48 . . ." *United States v. Morrell*, 524 F. 2d 550, 554 (2d Cir. 1975).

In those cases where the prosecutorial misconduct was deliberate, the standard of 'materiality' set forth in *Brady v. Maryland*, 373 U.S. 83 (1962) falls to a low threshhold, namely, whether " 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ' Napue, supra, at 271 (360 U.S.) . . ." *United States v. Pfingst*, 490 F. 2d 262, 279-80 (2d Cir. 1973). The Court of Appeals for the Second Circuit stated at note 5 in *Grant v. Alldredge*, 498 F. 2d 376, 381 (2d Cir. 1974): "In United States v. Polisi, 416 F. 2d 573, 577 (2d Cir. 1969) (emphasis inserted), we viewed the significance of Brady, which was not cited in Miller (United States v. Miller, 411 F. 2d 825, 832 (2d Cir. 1965)) but concerns the identical problem of prosecutorial non-disclosure, as 'its holding that the concept out of which the constitutional dimension arises in these cases is prejudice to the defendant *measured by the effect of the suppression upon defendant's preparation for trial*, rather than its effect upon the jury's verdict." (Matter in brackets added).

The deliberately suppressed evidence in this case and the false testimony and false evidence knowingly and deliberately introduced at trial by the prosecution was the per se evidence of the substantive crime, not merely evidence tending to affect the minds of the jury in their consideration of the evidence on the question of conviction or no conviction, and the prosecutor necessarily knew that. *United States v. Wilkins*, 326 F. 2d 135 (2d Cir. 1963); *Barbee v. Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir. 1964).

None of the foregoing cases dealt with prosecutorial misconduct as grave as that which is presented in this case.

In this case the prejudice to Rodriguez at trial and in the preparation for trial was more grievously serious and prejudicial in the deprivation of his constitutional right to a fair trial and to due process of law since the false evidence and the false testimony was the evidence of the crime itself as to the substantive count, count 3 of the indictment. The government wilfully, deliberately and knowingly presented to the Court and to the jury the false evidence that so-called "end-use certificates" in their various forms, (GX 11, 15, 19 and 31) (Appendix pp. 21a-24a) had been signed by Rodriguez when the government then and there well knew that Miguel Celis in the United States had *traced* the name of Rodriguez thereon, and that Miguel Celis, and others, in the United States, had filled up, typed up and prepared those so-called "end use certificates". Without the said false evidence and the said false testimony there would be no crime as to Rodriguez. See, *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Thompson v. Louisville*, 362 U.S. 199 (1960).

The evil complained of here is that the government not only knew since at least May 26, 1976, more than six months before the trial of this indictment, which commenced on September 20, 1976, that the very basis and foundation of its "case against Rodriguez was false, but when the evidence was presented that Rodriguez denied that he had signed that so-called "end use certificate" (GX 11, 15, 19 and 31), the Government not only failed to disclose the true facts known to it, as aforesaid, and not only concealed the true facts from the Court, the jury and defendant's trial counsel which it was his duty to disclose, *United States v. Wilkins*, 326 F. 2d 135, 138 (2d Cir. 1964); and wilfully failed to correct the falsity when it appeared, but more seriously, if that is possible, actively, deliberately, aggressively and purposefully misrepresented the facts to the Court and to the defendant's trial counsel, and continued to elicit testimony

from Government Agent Kelly, by hearsay, that the "end use certificate" (GX 11, 15, 19 and 31) 'was signed by the defendant Rodriguez', and by the purposeful examination of government witness Timothy Gomez to 'identify' the writing of the name on Government Exhibit 31 as the "signature of Manuel Alfonso Rodriguez" when the prosecutor well knew that its said witness Gomez has no familiarity at all with the defendant Rodriguez signing of his name and that the said testimony was incompetent, and more seriously, that it was false to the knowledge of the government. The Government knew since at least May 26, 1976, and when the trial commenced on September 20, 1976 that it had no case against Rodriguez on Count 3, the substantive count which was based on the charge that Rodriguez had *signed* the so-called end use certificate, namely Government Exhibit 31, in all of its forms (GX 11, 15, 19 and 31), and that Count 1, the conspiracy count, depended importantly, if not wholly, upon Count 3, and would have to be dismissed if the truth was disclosed by the prosecution. See, *Parr v. United States*, 363 U.S. 370, 393 (1960).

POINT II

THE GOVERNMENT DEPRIVED RODRIGUEZ OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS BY THE PRESENTATION OF FALSE EVIDENCE TO THE GRAND JURY.

The Grand Jury alleged in both Count 1 and Count 2 that the "certificate dated April 22, 1976", which was the subject matter of the substantial crime charged against petitioner Rodriguez as a violation of 18 U.S.C. Section 1001, and which was introduced in evidence by the government at trial as Government Exhibit 31 (GX 31) was

a certificate *"bearing the signature of defendant Manuel Alfonso Rodriguez."*

Miguel D. Celis admitted in open court on the record on May 26, 1976 before District Judge Charles D. Brieant in the presence of two Assistant United States Attorneys, Robert Gold, Esq. and James Moss, Esq., both of whom were present and actively assisting the United States Attorney at the trial of the petitioner, that as to that certificate dated April 22, 1976 described in Count 3 of the indictment as "bearing the signature of defendant Manuel Alfonso Rodriguez", that he "helped to trace the signature and I helped in filling it out." Appendix, pp. 12a-20a.

That certificate had been offered in evidence to the Grand Jury and was marked Exhibit 5. Appendix, pp. 17a-18a. It was false evidence against Rodriguez. That certificate was a forgery. The government knew it was a forgery perpetrated by Miguel D. Celis.

The indictment was returned against Rodriguez upon false evidence known to the government to be false. The indictment violated petitioner's constitutional rights under the Fifth and Sixth Amendments and must be dismissed. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); see also, *United States v. Doss*, 545 F.2d 548, 550 (6th Cir. 1976); *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957); *United States v. Gallow*, 394 F. Supp. 310, 312 (D. C. Conn. 1975); *United States v. De Marco*, 401 F. Supp. 505, 513 (D.C. Cal. 1975).

POINT III

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S WILFUL SUPPRESSION AND CONCEALMENT OF ESSENTIAL AND FUNDAMENTAL MATERIAL EXCULPATORY EVIDENCE.

It is clear that the evidence known to the government and concealed by it that Miguel D. Celis had forged the signature of Rodriguez on the certificate described in Count 3 and Count 1 of the indictment as "bearing the signature of defendant Manuel Alfonso Rodriguez" was essential and fundamental material exculpatory evidence which the government was required to disclose even in the absence of demand. *United States v. Agurs*, 427 U.S. 97 (1976). *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963). The government's wilful concealment and suppression of that exculpatory evidence violated petitioner's constitutional rights under the Fifth Amendment and requires the dismissal of the indictment. *United States v. Agurs*, supra, *Brady v. Maryland*, supra.

POINT IV

THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

The petitioner Rodriguez was denied the effective assistance of counsel which is his right under the Sixth Amendment of the Constitution by the ineffectiveness of retained trial counsel.

The said retained counsel failed to make any motion to require the suppression as evidence against the petitioner Rodriguez of the so-called "end use certificate" in all of its forms, as false evidence at any time, either before trial or during trial.

The said retained counsel failed to investigate and to discover the fact that Miguel Celis had entered a plea of guilty to Count 3 of this indictment following a plea bargain, to investigate and discover the facts concerning the plea bargain, and to investigate the file record in this case and to discover the transcript of those plea proceedings before Judge Charles L. Brieant on May 26, 1976, which was stamped as having been filed on August 18, 1976, more than one month prior to the commencement of the trial of this action, wherein the testimony of Miguel Celis established that he, Miguel Celis, in the United States had forged the signature of petitioner on blank sheets of paper bearing the letterhead of the Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, which were thereafter typed up, filled up and prepared by Miguel Celis and others, in the United States, as the so-called "end use certificate", in its various forms, and that Rodriguez did not sign any of those "end use certificates" in any of the varied forms as charged in the indictment. The discovery and proper use of this transcript by effective counsel, needless to say, would have changed the result of this trial and would have exonerated and exculpated the petitioner of the counts charged against him in this indictment.

The retained counsel made no objection at trial to the introduction by the Government into evidence of the so-called "end use certificate" allegedly "signed" by the defendant Rodriguez and marked as Government Exhibit 31 (T. 617, 618) and the retained counsel made no objection to the introduction of a blank sheet of paper bearing the alleged letterhead of the "Estado Mayor General de la

Fuerza Armada, San Salvador, El Salvador, C.A.", and allegedly "signed" by the defendant Rodriguez marked as Government Exhibit 11 (T. 257-258), and the retained counsel made no objection to the introduction by the Government into evidence of a photocopy of a one-paragraph variation of the so-called "end use certificate" also allegedly "signed" by the defendant Rodriguez and marked as Government Exhibit 15 (T. 269-270), and the retained counsel made no objection to the introduction by the Government into evidence of a photocopy of the so-called "end use certificate" (GX 31), also allegedly "signed" by the defendant Rodriguez and marked as Government Exhibit 19 (T. 277-278). As set forth above, the so-called "end use certificate(s)" formed the centerpiece and the cornerstone of the Government's case against the defendant Manuel Alfonso Rodriguez. As set forth above, these so-called "end use certificate" in fact were *not signed* by the defendant Manuel Alfonso Rodriguez, and he had no hand in their preparation, and as set forth above, Miguel Celis had *traced* the name of the defendant Rodriguez on exhibits in the United States and Miguel Celis had, with others, not the defendant Rodriguez, filled up, typed up and prepared those exhibits. As set forth above, the retained counsel had been informed by defendant Rodriguez long before the trial that he did not sign any such papers and did not have anything to do with them.

Without those exhibits in evidence, Count 3 of the indictment must be dismissed.

Without those exhibits in evidence, Count 1 of the indictment would be dismissed, or at least would present a solid basis for dismissal of that count.

Either the retained attorney did not understand the meaning and importance of those exhibits to the defense of Manuel Alfonso Rodriguez, and did not know about or understand the rules of evidence with regard to excluding

such exhibits by proper objections, or having such knowledge or information, failed to carry out his duties as defense counsel and acted contrary to those duties and in favor of the prosecution with the purpose to effect the conviction of the defendant. Upon proper objection by defense counsel none of those exhibits could have been admitted into evidence by the Government against the defendant Manuel Alfonso Rodriguez unless the government laid a proper foundation to establish the authenticity of the signature, the paper, the letterhead, the typing, etc., which the Government could not have been able to do since the Government had not sought nor obtained any handwriting exemplars from the defendant, and particularly since the government knew that the defendant Rodriguez did not sign any of those exhibits and that the perpetrator of the exhibits was Miguel Celis, the government's own witness.

The retained counsel failed to object to the hearsay testimony, and double and triple hearsay testimony by Government Agent Kelly, and as to the tapes, which were offered for the truth of that hearsay, and did not seek or obtain proper Court limiting instructions.

The retained counsel on summation effectively argued the prosecution position; he assured the conviction of the defendant by his argument on a matter that was not in evidence, that Miguel Celis had informed the defendant, although "never fully", "what this transaction was all about" (T. 796-797). Either the retained counsel intended to assure the conviction by the jury of this defendant, or he simply did not know what he was saying; in either event, it was ineffective assistance of counsel.

The retained counsel's summation was more consistent with a prosecution of the defendant Rodriguez, than a defense for him. The retained counsel declared on summation that Miguel Celis "is the direct link allegedly with the Colonel" (T. 797), that he could not ask Government

Agent Kelly "did you have this conversation with the Colonel in San Salvador, because Agent Kelly is *telling us what Celis says.* He is doing his job the best he can. . . . " (T. 797). He argued the sham argument, which was obviously so to the jury since he did not call Miguel Celis as a witness, "But I want Celis", after he condemned the defendant by his words that the defendant had been informed of what this transaction was about by Celis, who was not a witness and was not subject to cross-examination.

The said retained counsel failed to properly or adequately research the laws, rules of evidence, and cases applicable to this indictment and to apply the facts of this case thereto so as to carry out his duties as defense counsel. The retained counsel actually stated on the record . . . "I will ask on my case that the videotape be replayed. It is my defense" (T. 169).

The retained counsel failed to make any motion addressed to the face of the indictment, including a motion to dismiss each count of the indictment for insufficiency, which motion would have served additionally to obtain and preserve for the defendant Rodriguez a more advantageous standard of appellate review of the sufficiency of the indictment and each count thereof, (none of which alleged that the statements were "material" and that the allegations of Count III failed to state facts to show that the allegations in the "certificate" were false, in that the allegation that the arms "were to be sold to individuals in the United States is not inconsistent with and does not show the falsity of the alleged representations charged. The preparation set forth in Part III, paragraphs 11(a) and 11(b) of the indictment, the word "facilitating" set forth in "Overt Acts", paragraph 7 of the indictment, the word "facilitated" set forth in "Overt Acts" paragraph 15 of the indictment, the words "facilitate the making of" set forth in Count III of the indictment, on the grounds that the word "facilitate", in all of its stated variations is not any

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statement" to the prosecution and its obvious lack of usefulness to the defense, and that the prosecution could not have introduced that "post-arrest statement" upon the trial, certainly not on its case in chief, and in the face of the facts, and the defendant Rodriguez had informed the retained counsel of the circumstances which occurred, which were inconsistent with the "post-arrest statement", and notwithstanding that the defendant Rodriguez informed the retained counsel that the "Statement" was not a true or accurate representation of what had actually occurred which the retained counsel acknowledged on the record (T. 629) even though retained counsel did not state the true facts and that there was a great deal that was not true and correct, and that the so-called Spanish interpreter had little apparent competence in the Spanish language and that the alleged questions and answers were not true or accurate, and as more fully set forth below on the motion of the defendant Rodriguez to suppress that alleged "post-arrest statement".

The failure of retained counsel to investigate the incident on May 15, 1976, including the actions and procedures of the Government in videotaping and audiotaping one or more rehearsals of the interrogation planned by the Government for the defendant Rodriguez and to promptly move in Court to require the Government to produce all of such videotapes and audio tapes, which, as a result of the failure of the retained counsel to act, as your deponent was informed by Agent Wessel of the Alcohol, Tax and Firearms Division of the United States Treasury Department, informed your deponent on January 17, 1977 that the tapes are no longer available and were probably erased or reused, but at what time or under what circumstances, Agent Wessel stated that he did not know.

The failure of retained counsel to interview any of the local police officers of Westchester County and to move to obtain copies of their reports concerning this indictment.

element or part of, nor is it a proscribed conduct or act under any criminal statute charged against defendant Rodriguez and that such allegations in the indictment denied the defendant Rodriguez his federal constitutional right of due process of law, not to be charged by indictment with a non-crime and not to be convicted of crime based upon an act which is not a crime, as to which act, "facilitate", the trial court, plainly relying upon the indictment, rather than the criminal statutes, charged the jury that the crime charged could be so committed, i.e., by facilitation, and that the defendant Rodriguez could be found guilty of the counts charged against him on that basis (T. 869, 872, 873, 888, 892, 893, 895) in violation of the federal constitutional right of defendant Rodriguez to due process of law.

The retained counsel failed to make any motion to suppress all evidence of the incident on May 15, 1976, including the videotape and audio tapes thereof, as herein made and set forth.

The retained counsel failed to make any motion to suppress the so-called "post-arrest statement", as herein made and set forth and, on the contrary, instead of moving to suppress it, this retained counsel actually insisted upon introducing it in evidence at the trial (T. 514-515; 628-632) notwithstanding the cautions which the Trial Court justly and properly called to the attention of the retained counsel (T.521: "Are you sure you want to put this?"; T. 524: "Bring it out through him" (the defendant Rodriguez); T. 524: "That could be misconstrued by the jury"; T. 524: "Let's not have the danger come before the explanation;" and T. 628: "that document is not going to go in unless Mr. Hallinan insists that it comes in"; T. 628: "I don't want that document in here"), notwithstanding the obvious damage and prejudice of that so-called "post-arrest statement," to the defense of the indictment, and notwithstanding the obvious usefulness of that "post-arrest

There was ineffective assistance of counsel in violation of defendant's constitutional rights under every standard. *Tollett v. Henderson* 411 U.S. 258, (1973); *McMann v. Richardson*, 397 U.S. 759 (1970); *United States v. Wight*, 176 F. 2d 376 (2d Cir. 1949, cert. den 338 U.S. 950 (1950); *United States ex rel Marcelin v. Mancusi*, 462 F. 2d 36 (2d Cir. 1972), cert. den. 410 U.S. 917 (1973); and cases cited.

POINT V

THE CONDUCT OF THE GOVERNMENT AGENTS AND ATTORNEYS IN SURREPTITIOUSLY INTERROGATING RODRIGUEZ UNDER THE CIRCUMSTANCES WITHOUT ACCORDING HIM HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS REQUIRE THAT ALL EVIDENCE THEREOF INCLUDING VIDEOTAPES AND AUDIOTAPES, BE SUPPRESSED.

The interrogation on May 15, 1976 of Rodriguez was carefully planned with and by the United States Attorney and his Assistant United States Attorney, Government Agent Kelly, and others in the Bureau of Alcohol, Tobacco, and Firearms, since May 12, 1976 (T. 455, 456) as shown by the testimony of Government Agent Kelly (T. 455-457, 481-482, 311-312). Government Agent Kelly testified that the purpose of that set-up was to interrogate Rodriguez on the crimes as to which the investigation had focused on him so as to compel him to incriminate himself and to establish and provide the evidence of crime against himself, without allowing him to know that he was being interrogated by Government Agents for that purpose, and to arrest him (T. 459-461, 479-482). When the defendant Rodriguez was so brought to the Holiday Inn, he was taken

into the Banquet Room (T. 309, 310). "After a brief introduction, we told the parties there that *we were going to take Colonel Rodriguez*, Mr. Celis, Mr. Michaelson, Mr. Tobacman into another room so we could get our business out of the way . . ." (T. 313). The private room was at another part of the Holiday Inn, which had been set up, as aforesaid (T. 313). There were "approximately ten federal agents", all armed, in the motel in connection with this case, in addition to local police officers (T. 458, 332). The private room was occupied by at least two government agents, (Kelly, T. 313, and McInniney, T. 333, 458), and at least one police officer (T. 332) and at least one government informer or person working under the control and direction of Government agents (Stagg, T. 313), and very likely another person working under the direction of the Government, Miguel Celis (T. 313), (see below, p. 46, 47, and at least one New York Police Officer, Detective Bill Irwin (T. 174). Inside the room, one agent, Agent McNinney, stood near the door (T. 333, 458), apparently the only means of ingress and egress from that room. In the adjoining room were other Government agents surveilling the interrogation room with videotape and audiotape equipment and recordings, supra. The defendant was at all times in the presence, control and custody of the Government agents. There is evidence showing that Miguel Celis was working for or under the direction of Government Agent Kelly. (T. 307, 310; Nagra tape recorder carried by Government Agent Kelly on May 15, 1976). At the trial, Government Agent Kelly exposed a fact which showed that Miguel Celis was working for or under the direction of the Government by his testimony as follows:

> "*What's to prevent these guys, Celis, from giving up anyone* and telling us that this is Colonel Rodriguez, and us paying the money and then walking away and we don't know who we paid". (T. 307). (Underscoring added).

The underlined statement is police jargon to describe a situation in which an informer or a person arrested for a crime sets up another person, in this case Celis set up defendant Rodriguez, as part of his deal to be 'let off the hook'. The latter portion of Government Agent Kelly's testimony is more fully discussed below. The recording made by Government Agent Kelly on the Nagra recorder carried on his person at the time, or part of the time of the events at the Holiday Inn on May 15, 1976 reveals additional evidence to support this fact, wherein he records his own voice whispering an instruction and warning by Government Agent Kelly to Miguel Celis, as those two were apparently proceeding from the Banquet Room to that private interrogation room, as follows:

(In a whisper)

"Kelly: Miguel, I advise you ask the Colonel every question we talked about, understood!

Miguel: (Not intelligible).

Kelly: Just fabulous, just fabulous, very good.

Kelly: (In a louder voice) Ah, it's too crowded, too confused. Angelo is in there bang . . ."

(This conversation appeared at Register Number 367-368 on a Toshiba, GT-810S Stereophonic Recorder-Player of the above described copy of the Nagra tape, as furnished by the Government to Gordon Lang, Esq. and was heard by the jury. This evidence indicates that Miguel Celis was then working with or under the direction of Government Agent Kelly in the government's planned custodial, planned arrest focused interrogation of defendant Rodriguez. The latter part of Government Agent Kelly's statement (T. 307), aforesaid, namely, "What's to prevent these guys, Celis, from giving up anyone and telling us that this is Colonel Rodriguez *and us paying the money and then walking away and we don't know who we paid*" (T. 307) is inconsistent with the actual facts shown above. The Government plainly had no intention of allowing anyone to

receive any money and to walk out with any money. The only way any of those people were going to walk out of that room, as Government Agent Kelly testified above, was under formal arrest and in handcuffs, which is what happened (T. 335, 336). The evidence shows that a Government Agent and a police officer met the defendant Rodriguez, Miguel Celis, and Raymond Geraldo at Kennedy Airport, took them into the government operated motor vehicle and drove to a place (T. 457, 310, 280) that was unknown to the defendant Rodriguez who had no knowledge, experience or familiarity with this country and with the New York area in particular. The defendant Rodriguez had only the government operated vehicle as the means of ingress, travel and egress. When he was brought to the Holiday Inn, at Westchester, he did not know where that was located and had no way of knowing where he was. His entrance and exit was totally within the control of the government. The government, by the United States Attorney, his Assistant United States Attorney, Government Agents from the Alcohol, Tax and Firearms Bureau, including senior officers thereof both of this area and of the region, and local police from the City of New York and from Westchester County, had conferred at least one day, or more, prior to May 15, 1976, and had decided to effect arrests of other defendants in this case, and of this defendant Rodriguez whom they determined to surreptitiously interrogate and elicit incriminating statements from him without informing him that he was being interrogated by government agents, and without according him his rights under the Fifth and Sixth Amendments (T. 455-457, 479, 482, 311-312, 459, 461, 174). The Government Agents at all times outnumbered the defendant Rodriguez and at all times had the defendant in their power and control (T. 457, 312, 313, 393, 358, 336, 332, 333, 458, 335). The Government Agents exercised their power and control over the defendant Rodriguez after he

had been taken into the hotel by other Government Agents and police and directed and escorted the defendant Rodriguez into a rather small room in that hotel (T. 309, 310, 313) which was surreptitiously occupied by other Government Agents (T. 332, 458), and which had been prepared and set up to record visually and orally, on videotapes and audiotapes (T. 311, 312) the surreptitious, affirmative, deliberate, planned, and focused interrogation of the defendant Rodriguez which has been carefully prepared and rehearsed by the full array of government power which included the United States Attorney for the Southern District of New York and one or more of his Assistants (T. 455-456, 457, 481, 482, 311, 312, 459-461, 479-482) in order to extract incriminating evidence from the defendant Rodriguez by means of surreptitious unwarned interrogation of the defendant Rodriguez (T. 459-461, 479-482). At that time, as the record shows, the Government investigation had fully focused on this defendant Rodriguez as to specific crime and the clear purpose of the massive preparations by the United States Attorney and his Assistants and other government and police officials was to incriminate the defendant Rodriguez by the means and method of surreptitious, unwarned, aggressive, government initiated and government pursued interrogation. The government carefully selected and prepared the setting so that it would be an isolated place, and totally under the domination and control of the government attorneys and agents, and to have the defendant Rodriguez similarly under their total control, custody and domination, which was so effectuated. The government was not engaged in any generalized investigation of crime. The government was then engaged and involved in a tightly and sharply focused criminal proceeding against the defendant Rodriguez for specific crimes. The conduct of the government prosecutors and agents in the circumstances violated the constitutional

rights of the defendant Rodriguez under the Fifth and Sixth Amendments and requires that the evidence derived therefrom be suppressed. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Haley v. Ohio*, 332 U.S. 594, 607 (1947); *Lyra v. Denno*, 347 U.S. 556 (1953); *Orozco v. Texas*, 394 U.S. 324 (1969); *Massiah v. United States*, 377 U.S. 201 (1964); *Mathis v. United States*, 391 U.S. 1 (1968); *Kirby v. Illinois*, 406 U.S. 682 (1972); *United States v. Ash*, 413 U.S. 300 (1973); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *United States v. Hayles*, 471 F. 2d 788 (5th Cir. 1973); *Windsor v. United States*, 389 F. 2d 530 (5th Cir. 1968); *United States v. Corollo*, 505 F. 2d 50 (5th Cir. 1975); *United States v. Phelps*, 443 F. 2d 246 (5th Cir. 1971).

POINT VI

THE PRE-ARRAIGNMENT INTERROGATION BY THE ASSISTANT UNITED STATES ATTORNEYS VIOLATED DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS AND ALL EVIDENCE THEREOF AND DERIVED THEREFROM MUST BE SUPPRESSED

At the time that Rodriguez was being taken to be arraigned on charges made by the government, he was improperly sidetracked by government attorneys, and subjected to their interrogation. *United States v. Duvall*, 537 F. 2d 15, 23-26 (2d Cir. 1976); *United States v. Marrero*, 450 F. 2d 373, 376-379 (2d Cir. 1971); *United States v. Middleton*, 344 F. 2d 78 (2d Cir. 1965). Critical criminal proceedings and the prosecution of the defendant had already commenced, having commenced at least at the hotel; the adversary system was in full gear; the govern-

ment attorneys were already arrayed against him, confronted him and set about to enmesh him by the power of the prosecution to compel him to incriminate himself. The defendant Rodriguez had already requested the right to telephone his president of the Republic of El Salvador, the Defense Minister, the Ambassador, and the United States Armed Forces Chief of Staff, since, as he informed the government agents, he did not know any counsel here, and that was his *counsel* in those circumstances; *Haley v. Ohio*, 332 U.S. 600-01, 607 (1947) (Counsel or friend); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (outside assistance); *People v. Washington*, A.D. 2d , 383 N.Y.S. 2d 422, 424 (3rd Dept. 1976) (Sister or attorney). Those requests, under the Fifth and Sixth Amendments, should have been honored immediately; the requests precluded the government attorneys from interrogating the defendant. However, the defendant's requests were not honored and the interrogation was aggressively commenced and conducted by government attorneys. The defendants' right under the Fifth and Sixth Amendments were violated by the pre-arraignment interrogation conducted by the government attorneys and all evidence thereof and derived therefrom must be suppressed. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *Massiah v. United States*, 377 U.S. 201 (1964); *Spano v. New York*, 360 U.S. 315 ; *Powell v. Alabama*, 287 U.S. 45 ; *Coleman v. Alabama*, 399 U.S. 1 (1970); *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

Under the substantive test of voluntariness, the claimed post-arrest statement was not voluntary, even if Miranda warnings had been given, which is challenged. *Von Moltke v. Gillies*, 332 U.S. 708 (1947); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Ash*, 413 U.S. 300 (1973); *People v. Andino*, 362 N.Y.S. 2d 766 (Sup. Ct. N.Y. 1974).

POINT VI

THE PRE-ARRAIGNMENT INTERROGATION BY THE ASSISTANT UNITED STATES ATTORNEYS VIOLATED DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS AND ALL EVIDENCE THEREOF AND DERIVED THEREFROM MUST BE SUPPRESSED

At the time that Rodriguez was being taken to be arraigned on charges made by the government, he was improperly sidetracked by government attorneys, and subjected to their interrogation. *United States v. Duvall*, 537 F. 2d 15, 23-26 (2d Cir. 1976); *United States v. Marrero*, 450 F. 2d 373, 376-379 (2d Cir. 1971); *United States v. Middleton*, 344 F. 2d 78 (2d Cir. 1965). Critical criminal proceedings and the prosecution of the defendant had already commenced, having commenced at least at the hotel; the adversary system was in full gear; the government attorneys were already arrayed against him, confronted him and set about to enmesh him by the power of the prosecution to compel him to incriminate himself. The defendant Rodriguez had already requested the right to telephone his President of the Republic of El Salvador, the Defense Minister, the Ambassador, and the United States Armed Forces Chief of Staff, since, as he informed the government agents, he did not know any counsel here, and that was his *counsel* in those circumstances; *Haley v. Ohio*, 332 U.S. 600-01, 607 (1947); (Counsel or friend); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (outside assistance); *People v. Washington*, A.D. 2d , 383 N.Y.S. 2d 422, 424 (3rd Dept. 1976) (Sister or attorney).

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POINT VII

THE FAILURE OF THE TRIAL COURT TO RENDER ANY PRELIMINARY INSTRUCTION ON THE CONSPIRACY COUNT WAS PLAIN ERROR AND REVERSIBLE

The trial court wholly omitted to render any preliminary instruction to the jury on the conspiracy count at any time after the first testimony was offered on the conspiracy count, and to instruct the jury on the use and value of hearsay evidence on a conspiracy count

"explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony." *United States v. DeJesus*, 520 F. 2d 288, 301 (5th Cir. 1975).

POINT VIII

THERE WAS NO INDEPENDENT HEARSAY EVIDENCE WHICH ESTABLISHED THAT THE DEFENDANT RODRIGUEZ HAD ANY PART WHATEVER IN THE CONSPIRACY CHARGED IN COUNT I WHICH WAS CONSUMMATED ON MAY 5, 1976

Rodriguez was not in view at all prior to May 15, 1976 (T. 300, 310, 311; 258). The conspiracy charged in Count 1 had already been consummated on May 5, 1976 with the filing of the documents described in Count 2, 3, and 4. (T. 450-452; 613). The admission of hearsay evidence after May 5, 1976 was plain error and requires reversal of the judgment.

POINT IX

THE GOVERNMENT IS ESTOPPED TO DENY THAT THERE WAS NO EVIDENCE TO PROVE THAT THE DEFENDANT RODRIGUEZ SIGNED THE SO-CALLED, "END USE CERTIFICATE"

The prosecutor in his closing statements declared and admitted that:

> "As to the substantive Count, Count 3, the end use certificate which Mr. Celis and Mr. Geraldo brought up from El Salvador on May 2d, *there is no proof* in that document. We are not contending in the absence of that proof that he actually did in fact sign it . . . " (T764).

The Government is bound by its admission and is estopped to deny that there is no proof in this case that the defendant Rodriguez signed that document, namely, the so-called "end use certificate", Government Exhibit 31, which is described in and is the basis of the substantive count, Count 3 of the indictment. *The Philadelphia, Wilmington and Baltimore RR. Company v. Howard,* 54 U.S. 307 (1851); *Davis v. Wakelee,* 156 U.S. 680 (1894); *Sturm v. Boker,* 105 U.S. 312 (1892); *Railway Co. v. McCarthy,* 96 U.S. 258 (1877). The doctrine of collateral estoppel is applicable in criminal cases. *Yates v. United States,* 354 U.S. 298, 335 (1956); *United States v. Oppenheimer,* 242 U.S. 85.

POINT X

THE STATEMENTS OF THE PROSECUTOR MISSTATING THE FACTS AND STATING MATTERS AS FACTS OUTSIDE OF THE RECORD DEPRIVED DEFENDANT OF A FAIR TRIAL AND MANDATES A REVERSAL

In his closing statements after admitting that there was no proof in the case that the defendant Rodriguez had signed the end use certificate upon which Count III was based, the prosecutor stated:

> "If you find, as I submit you must, from this evidence that the signature was put on that document, however it got there, with the knowledge, consent and authorization of Colonel Rodriguez, then he is equally responsible as if he signed it himself" (T. 764).

There was in fact no evidence whatever, not even a scintilla of evidence that the defendant Rodriguez had any knowledge as to who placed that false "signature" on that "end use certificate", much less that it was done by someone with the "consent and authorization of Colonel Rodriguez" (T. 764). This was a testimonial declaration by the prosecutor introducing to the jury matters that were not in evidence. *United States v. Newman,* 490 F. 2d 139 (3rd Cir. 1974).

Similarly the prosecutor testified on his closing statement that the defendant Rodriguez knew prior to May 5, 1976 that the "end use certificate" would be filed with the State Department (T. 765), and that defendant Rodriguez "agreed" with Mr. Geraldo (or anyone else) to provide the "end use certificate", which was the basis of Count III (9A), for $75,000 in cash, or for any amount (T.742). There was no evidence in the trial to authorize the prosecutor to declaim that

> "the only way to get at the bottom of this kind of thing is precisely the way Agent Kelly did it in this case . . . That is not his job to say 'I am a treasury agent tell me more about this' . . . that the use of undercover agents as Agent Kelly was in this case is a lawful proper indeed necessary indespensible technique of law enforcement if this kind of conduct is going to be rooted out and stopped" (T 746, 747).

The prosecutor added his own evidence on summation when he declared that the "end use certificate" looked to him like it had a seal on it (T 749). The prosecutor also declaimed that

'the existence of prior discussions with defendant Rodriguez about this whole scheme, amply overwhelmingly, demonstrates Colonel Rodriguez' knowledge that he was being paid $75,000 for documentation that he signed the DSP-83 that he knew was false. It said right on the face of it, 10,000 Bushmaster submachine guns are being purchased for the national defense of El Salvador'. (T 762.

There was no evidence that the DSP-83 was actually filled in, or that the defendant had read the reverse side from where his signature was allegedly placed at the time the signature was allegedly placed thereon. The prosecutor called for the conviction of the defendant on the basis that

"he has amoral guilt in regard to the document described in Counts II, III and IV as to which he had no connection". (T 766).

This latter declaration by prosecutor was improper, and deprived the defendant of his constitutional right to a fair trial and to due process of law. See, *United States v. Loschiavo*, 531 F. 2d 659, 667 (2d Cir. 1975).

It is fair to conclude that the jury convicted the defendant Rodriguez on a basis that was neither charged nor proved. *Eaton v. Tulsa*, 415 U.S. 697, 698-99 (1973).

"When a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required. See United States v. Tucker, 267 F. 2d 212 (3d Cir. 1959), where the prejudice is substantial, cautionary instructions will not preclude a reversal. See, e.g. Dunn v. United States, 307 F. 2d 883, 886 (5th Cir. 1962); United States v. Bugros, 304 F. 2d 177 (2d Cir. 1962); Government

of Virgin Isles vs. Tumer, 409 F. 2d 102, 103, 104 (3d Cir. 1969). If the cautionary instruction is not clear and direct enough to neutralize the prejudice to the defendant, a reversal is mandated. United States v. Leftowich, 461 F. 2d 586, 590 (3d Cir. 1972)." *United States v. Newman*, 490 F. 2d 139 (3d Cir. 1974).

POINT XI

THE INDICTMENT IS INVALID IN THAT IT ALLEGES AS A CRIME ACTS WHICH UNDER STATUTE DO NOT CONSTITUTE A CRIME.

The trial court properly charged the jury that the only federal crimes are those set forth by statute (T868). *United States v. Gradwell*, 243 U.S. 476, 478 (1917), *United States v. Eaton*, 144 U.S. 677 (1891). The elements of a criminal offense are determined from the statute. The trial court read the statute 18 U.S.C. Section 1001, in part, to the jury (T890).

The indictment, the government's method of pleading, on the other hand, is not determinative of the elements of a federal crime. *United States v. King*, 521 F. 2d 61 (10th Cir. 1975). This indictment included the allegation that in the conspiracy count, Count I Overt Act Number 7 that:

"On or about May 2, 1976, the defendants Raymond Geraldo, Robert Michaelson, Dominick Cagianese, and Miguel D. Celis met at the Pepper Tree Testaurant, Mt. Kisco, New York and had a conversation concerning a cash payment to be made to the defendant Manuel Alfonso Rodriguez in return for the defendant Rodriguez facilitating the filing of false and fraudulent documents with the United States Department of State." (See also Overt Act Number 15)

Count III similarly charged as a crime the defendants named, including defendant Rodriguez

> ". . . did . . . *facilitate* the making of . . . certain false, fictitious and fraudulent representations on a certificate dated April 22, 1976 on the official letterhead of the 'Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, S.A. bearing the signature of defendant Manuel Alfonso Rodriguez . . . "

Neither 18 U.S.C. Section 1001, nor 18 U.S.C. Section 2, nor 18 U.S.C. Section 371, nor the Gun Control Act of 1968, respectively include as a crime, the act of 'facilitating'. " 'Facilitate' means 'to make easy or less difficult'. *United States v. Barrow*, 212 F. Supp. 837, 840 (E.D. Pa. 1962)." *United States v. Miller*, 379 F. 2d 483, 486 (7th Cir. 1967).

The trial court charged the jury as to the substantive Counts II, III, IV, that these counts

> "charge certain of the defendants with having made, *facilitated* the making of and causing to be made certain false, fictitious or fraudulent statement . . . " etc. (T. 869-870).

The trial court read portions of the indictment to the jury which included the charge of "*facilitate*" as to both the conspiracy count (T872, 873, 886) and as to the substantive count (T892), and included that act as an essential element of the crime charged (T893, 895).

Rodriguez was subjected to criminal liability upon facts which do not constitute any crime, *Thompson v. Louisville*, 362 U.S. 199 (1960) and upon a "crime" not charged by statute. See, *Eaton v. City of Tulsa*, 415 U.S. 697-699 (1973). Upon what theory was Rodriguez convicted by the jury, that he "facilitated" the perpetration of the crime of filing a false document by "signing" the certificate. See *Gilbert v. United States*, 370 U.S. 650, 653 (1961). Rodriguez did not sign the certificate, as shown above.

POINT XII

THE INDICTMENT IS INSUFFICIENT ON ITS FACE

The indictment as to both Count I and Count II is insufficient on its face. The charging provisions of the indictment fail to state the facts to identify the agreement allegedly made which purportedly violates the statutes cited and fail to set forth and identify the facts to show material falsity within the meaning of the statutes cited. The indictment under Count I merely characterizes as "false and fraudulent documents", four generalized forms, and fails to state the facts to show what it is that was allegedly "false and fraudulent", and to show that the same was material and capable of influencing the decision makers in the agency involved and perverted their function. The indictment under Count II is similarly deficient on its face. *Hamling v. United States*, 418 U.S. 87 (1973); *United States v. Hess*, 124 U.S. 483, 487 (1888); *United States v. Simmons*, 96 Ul S.,362-365 (1878); *United States v. Clark*, 412 F. 2d 885, 888 (5th Cir. 1969); *Chappell v. United States*, 270 F. 2d 274, 276 (9th Cir. 1959); *Hammerschmidt v. United States*, 265 U.S. 182 (1924); *United States v. Krause*, 507 F. 2d 113 (5th Cir. 1975); *United States v. Snider*, 502 F. 2d 645 (4th Cir. 1974).

POINT XIII

THE TRIAL COURT'S INSTRUCTION AS TO REASONABLE DOUBT WERE ERRONEOUS.

The trial court instructed the jury that it may convict the defendant:

> "if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt" (T868).

Also, at 867:

> "not proof to a positive certainty or beyond all possible doubt. If that were the rule, it would be practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to a mathematical computation. As a consequence, the law is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt."

This was reversible error in this case. *United States v. Shaffner*, 524 F. 2d 1021 (7th Cir. 1975). It is difficult enough for reasonable men to understand the concept of reasonable doubt. This charge created a heavy weight in favor of conviction and demeaned and impugned the standard of reasonable doubt fundamental to defendant's constitutional rights to due process of law. *In re Winship*, 397 U.S. 358, 364 (1970).

POINT XIV

THE INTRODUCTION OF MOUNTAINS OF HEARSAY TESTIMONY DEPRIVED DEFENDANT OF A FAIR TRIAL AND VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The trial was based upon and conducted upon hearsay testimony not only of the chief government witness, Agent Kelly, but of each of the government witness, which hearsay testimony was generally elicited by leading questions. These hearsay statements included the tape recordings which were played to and heard by the jury. The motion to strike the hearsay (T707) should have been granted. It was denied (T.725). The motion for a mistrial should have been granted (T.723). *Bruton v. United States*, 391 U.S. 123 (1968).

POINT XV

THE INTRODUCTION OF THE ACTUAL WEAPON SUBMACHINE GUN WAS PREJUDICIAL AND REVERSIBLE ERROR.

The government introduced in evidence an actual submachine gun in apparently operable form. (T234-236, 690-691, 661, 678) There was no valid material, or relevant basis for such introduction. (T672, 675-7) The purpose was solely to inflame the jury and to prejudice the defendants. The testimony showed that no submachine guns were ever manufactured for and that no submachine guns were ever sold to any of the defendants or anyone else (T664-666). The manufacturer testified that he did not even order any material from his suppliers in order to manufacture such submachine guns. (T.678-684). The introduction of the submachine gun was obviously intended to give the appearance of reality to a scheme that was created, invented, manufactured and pushed along, solely by the government and solely for the purpose of creating criminality or the appearance thereof. It was reversible error. *United States v. Kessler*, 44 U.S. L.W. 1185 (1976).

POINT XVI

THE GOVERNMENT IS ESTOPPED TO USE THE DSP-83 AND TO ALLEGE THAT ANY STATEMENTS THEREIN ARE FALSE.

There was no evidence that the DSP-83 was actually filled up and typed up at the time it was signed on the reverse side by the defendant. There was no evidence that the defendant ever saw, much less that he read the front side of that paper. The government conceded that the defendant could not speak English (T314). The DSP-83 is

imprinted in English with a *Notice* that the only consequence for false statements is that it "may result in denial of participation in United States exports", to wit:

> "The making of any false statement, the concealment of any material fact, or failure to file the required information may result in denial of participation in United States exports. Notarization is not required."

The affirmative notice specifying the consequences estops the government from claiming other consequences, by its failure to warn of those other consequences in the light of that affirmative statement. It is fair to suggest that that is a rule of the Department of State, which must be followed by the government. See, *Vitarelli v. Seaton*, 359 U.S. 535 (1958); see also, *United States v. Bush*, 503 F. 2d 813 (5th Cir. 1974); *United States v. Leonard*, 524 F. 2d 1076 (2d Cir. 1975).

POINT XIX

THE ELECTRONIC RECORDINGS OF CONVERSATIONS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

The government embarked on a deliberate scheme to use electronic recordings of petitioner's conversations without any Warrant, in violation of his constitutional rights.••

POINT XXII

THE PROSECUTOR'S STATEMENTS VIOLATE THE DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT.

In his closing statements the prosecutor repeatedly asserted that the evidence referred to was "undisputed" (T. 738, 739, 742, 746). These statements impugned the defendant's constitutional rights under the Fifth Amendment were uncorrected by the trial court. The convictions should be reversed. *United States v. Hall*, 525 F. 2d 1254 (5th Cir. 1976).

In his closing statements the prosecutor declared that the jury should "satisfy you" (T769) as to the claims of the defendant was plain error, was not corrected by the court when it was objected to, and requires reversal of the conviction. *In re Winship*, 397 U.S. 358, 362-364 (1970); *Kibbe v. Henderson*, 534 F. 2d 493 (2d Cir. 1976).

The prosecutor's closing statements that Agent Kelly had a "sworn duty as an agent of the Treasury Department . . . to prevent this type of thing", and other remarks there (T 745-747) were inflammatory, improper and prejudicial to the defendant's rights to a fair trial.

CONCLUSION

The petition should be granted.

Dated: September 28, 1977

Respectfully submitted,

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1013, 1014—September Term, 1976.

(Argued April 4, 1977 Decided May 11, 1977.)

Docket Nos. 76-1589, 76-1590, 76-1591

UNITED STATES OF AMERICA,

Appellee,

v.

MANUEL ALFONSO RODRIGUEZ, and RAYMOND GERALDO,

Defendants-Appellants.

Before:

OAKES, *Circuit Judge,*
HOLDEN, *District Judge,**
and WYZANSKI, *Senior District Judge.***

Appeal from Judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge* on the grounds that the indictment was legally insufficient, the prosecutor had misconducted himself, the verdicts were based upon insufficient and improperly admitted evidence, the District Judge's instructions were improper, and defendant's trial attorney failed to give effective assistance of counsel.

Affirmed.

* Chief District Judge for the District of Vermont.

** Senior District Judge for the District of Massachusetts, sitting by designation.

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, Attorney for the United States of America and JAMES A. MOSS, LAWRENCE B. PEDOWITZ, and FREDERICK T. DAVIS, Assistant United States Attorneys, of Counsel, *for Appellee.*

CHARLES SUTTON, Attorney for Appellant Rodriguez, and GORDON J. LANG, Attorney for Defendant Geraldo, *for Defendants-Appellants.*

WYZANSKI, *Senior District Judge:*

Rodriguez and Geraldo appeal from judgments of conviction based on (1) Count 1 of an indictment charging them and others with violation of 18 U.S.C. § 371 by a conspiracy to file false documents with the United States Department of State and to violate the Gun Control Act of 1968, 26 U.S.C. §§ 5811, 5812, and 5861 (d) and (e), and (2) Count 3 of the same indictment charging them and others with violation of 18 U.S.C. §§ 1001 and 2 by having made false representations in matters within the jurisdiction of the United States Department of State. Geraldo also appeals from judgments of conviction on Counts 2 and 4 which involve the same statutory sections as does Count 3.

Each defendant claims that (1) the indictment was legally insufficient, (2) the prosecutor misconducted himself, (3) the jury's verdicts were based upon insufficient and improperly admitted evidence, and (4) the District Judge's instructions were improper. Additionally, Rodriguez alleges that because of the incompetence of his trial attorney he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

None of those claims is sound.

Count 1 of the indictment charged that appellants and others from January 1 to May 15, 1976 conspired to violate Title II of the Gun Control Act of 1968, 26 U.S.C. §§ 5811, 5812, 5861 (d) and (e) and 18 U.S.C. §§ 1001 and 2, which relate to false statements made to and within the jurisdiction of federal governmental agencies. It alleged that the object of the conspiracy was secretly to sell weapons and ammunition to buyers in the United States in a manner intended to conceal from the Departments of State and Treasury the true identities of the buyers; that to attain their object the conspirators agreed to prepare and file with the State Department fraudulent documents to create the false appearance that certain weapons and ammunition were to be purchased by foreign countries for their exclusive use; that among the means defendants used were (a) "defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents including: (i) an official . . . 'Application/License' . . . (ii) a certificate . . . bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition . . . signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83 . . . signed by the defendant Manuel Alfonso Rodriguez and bearing his official government seal", and (b) "May 5, 1976, the defendants filed, facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to . . . above"; and that in furtherance of the conspiracy defendants committed 15 described overt acts.

In Counts 2, 3, and 4, appellants and others were charged, in addition to the conspiracy, with substantive crimes in violation of 18 U.S.C. §§ 1001 and 2.

Count 2 alleged that on May 5, 1976 they "in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State . . . wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled 'Application/License for Permanent Export of Unclassified Implements of War' . . . that 10,000 'Bushmaster' submachine guns . . . together with . . . ammunition . . . were to be exported to . . . El Salvador . . . whereas . . . defendants . . . knew that the said . . . guns . . . were to be sold to individuals in the United States."

Count 3 is also based on 18 U.S.C. §§ 1001 and 2. The gravamen of the charge is that in a matter within the jurisdiction of the State Department defendants "knowingly did make, facilitate the making of, and cause to be made certain false . . . statements . . . on a certificate dated April 22, 1976 on the official letterhead of the 'Estado Mayor General De LaFuerza Armada, San Salvador, . . . C.A.', bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 'Bushmaster' submachine guns . . . were to be used by the armed forces of El Salvador . . . whereas . . . defendants . . . knew that the . . . guns . . . were to be sold to individuals in the United States . . ."

Count 4 is likewise based on 18 U.S.C. §§ 1001 and 2. Here the charge is that in a matter within the jurisdiction of the State Department, defendants "knowingly did make, facilitate the making of, and cause to be made certain false . . . representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation . . . to Mott Haven Industries, Ltd. . . . that 10,000 machine guns . . . were to be exported to El Salvador . . . whereas . . . defendants . . . knew that the . . . guns were to be sold to individuals in the United States . . ."

Defendants' contention that the indictment is legally insufficient was not raised in the District Court. Hence it is barred by Rule 12 (b) (2) of the Federal Rules of Criminal Procedure which provides that "objections based on defects in the indictment", except an objection that the indictment "fails to charge an offense", must be raised "prior to trial". *Davis* v. *United States*, 411 U.S. 233, 243 (1973); *United States* v. *Campisi*, 306 F. 2d 308, 311-312 (2nd Cir., 1962). Moreover, even if not barred, the contention would lack merit. Contrary to defendants' arguments, each count of the indictment specifies what was false about the cited document or documents submitted to the State Department; inasmuch as each count alleged that the false statement was submitted in a matter within the jurisdiction of a specified federal agency, that is the State Department, it was unnecessary for the indictment further to allege that the false statements were "material and capable of influencing" the State Department, *United States* v. *Adler*, 380 F.2d 917, 920-22 (2nd Cir., 1967); and even though the word "facilitate" does not appear in the text of either § 1001 or § 1002 of 18 U.S.C. the use in the indictment of that verb in *conjunction* with, and not as an *alternate* to, other verbs directly quoted from the statute was mere harmless surplusage.

Defendants' claims of prosecutorial misconduct are not merely baseless, but reflect on their counsel rather than on the United States District Attorney or his assistants.

The record makes it plain to us that, despite the canards of appellants' counsel, at every stage of the case the Government took the position that it did not claim that defendant Rodriguez had personally signed the certificate referred to in Count 3. Thus the sharpest distinction is drawn in Count 1 between the certificate *"bearing the signature of* . . . Rodriguez" and the Form DSP-83 "Consignee Purchaser Transaction Statement" *"signed by* . . . Rodriguez",

and the purchase order *"signed by* Howard Peters". That distinction was obviously maintained in the text of Count 3 of the indictment as well as in the various oral statements of Government counsel to the District Court and the defense counsel. No reasonable person could doubt that the prosecution's consistent position was that Rodriguez's name on the certificate was there with his full knowledge and authorization, but not as a result of his penmanship. This was the nub of the difference between the certificate *"bearing the signature"* of Rodriguez, and the Form DSP-83 *"signed"* by him.

Appellants' attack upon the Government's closing argument to the jury is so frivolous that we shall not place in the reports what we regard as unwarranted criticism of a wholly unobjectionable and indeed admirably fair summation. We reject the appellants' argument that by indirection the United States District Attorney drew attention to defendants' failure to take the stand. The Fifth Amendment and the statutes and cases which apply its teaching do not preclude a prosecutor from telling a jury that certain factual evidence, even if defendants have not conceded its correctness, is "uncontradicted". *United States* v. *Rodriguez,* 545 F. 2d 829, 832 (2nd Cir., 1976), *United States* v. *Armedo-Sarmiento,* 545 F. 2d 785, 793 (2nd Cir., 1976). Indeed, when considering what does constitute proof beyond a reasonable doubt, it is appropriate and perhaps inevitable for a jury or anyone else to examine not merely the solidity of the offered evidence but the fact that nothing in the record places the proffered evidence in doubt. Hence, the prosecutor has a right to show how strong is his case, even if it be true that it appears that a defendant's failure to take the stand or to offer evidence has left him facing a demonstration of Euclidean inevitability.

We have not overlooked, but need not comment extensively upon, other points raised on this appeal.

The United States District Attorney was justified in replying as he did in the District Court to the claim of defendants' trial counsel that the Government had used improper investigative techniques.

There is no merit to defendants' claims that the verdicts against them rest on insufficient, inadmissible, or constitutionally impermissible evidence.

We reject the argument of defendants' appeal attorneys that defendants' trial attorney failed to render his clients effective assistance of counsel. In any complicated case every lawyer, and we might add every judge, is likely to make both procedural and substantive errors, often reflecting mistakes of judgment under pressure. He is also apt to make minor errors of omission. But that is no reason to embrace the specious argument that a defendant has been prejudiced if his counsel fails to raise even meritless points in an effort to preclude a just conviction. Defendant's counsel has obligations to both the court and the client. As an advocate at the bar, he never ceases to be an officer of the court when serving as a lawyer for a litigant. Hence he has a duty not to be frivolous. Our study of this record as a whole satisfies us that defendants were adequately represented in the District Court.

Finally, we regard Judge Duffy's conduct of this case and his charge to the jury as worthy of commendation, not adverse criticism.

Judgments of conviction affirmed.

ORDER ON REHEARING DATED AUGUST 30, 1977 AS TO PETITIONER MANUEL ALFONSO RODRIGUEZ

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of August, one thousand nine hundred and seventy-seven.

Present: HON. JAMES L. OAKES, Circuit Judge
HON. JAMES S. HOLDEN,
HON. CHARLES EDWARD WYZANSKI, District Judge

76-1598

UNITES STATES OF AMERICA,

Plaintiff-Appellee,

v.

MANUEL ALFONSO RODRIQUEZ, RAYMOND GERALDO, ROBERT MICHAELSON, FRANK G. ALVAREZ, DOMINICK CAGIANESE, MIGUEL D. GELIS, IRWIN TOBUCHMAN,

Defendants

RAYMOND GERALDO,
MANUEL ALFONSO RODRIGUEZ

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Manuel Alfonso Rodriguez.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, Clerk

Order on Rehearing dated August 30, 1977 as to Petitioner Raymond Geraldo

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of August, one thousand nine hundred and seventy-seven.

Present: HON. JAMES L. OAKES, Circuit Judge.
HON. JAMES S. HOLDEN,
HON. CHARLES EDWARD XYZANSKI, District Judges

76-1589

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MANUEL ALFONSO RODRIGUEZ,
RAYMOND GERALDO, ROBERT MICHAELSON,
FRANK G. ALVAREZ, DOMINICK CAGIANESE
MIGUEL D. GELIS, IRWIN TOBUCHMAN,
Defendants
RAYMOND GERALDO, MANUEL ALFONSO RODRIGUEZ,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Raymond Geraldo,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, Clerk.

Admission by Miguel D. Celis on May 26, 1977 that he forged the signature of petitioner Rodriguez on the certificate charged against Rodriguez in Count 3 of the indictment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs-

MIGUEL D. CELIS,

Defendant.

BEFORE:

HON. CHARLES L. BRIEANT,
District Judge.

76 Cr. 503 KTD

New York, N.Y.
May 26, 1976 - 4:00 p.m.

APPEARANCES:

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York;
By: ROBERT GOLD, ESQ., JAMES MOSS, ESQ.

PETER LEISURE, ESQ.,
For the defendant.

THE COURT: Has the defendant been before the Magistrate?

MR. GOLD: He has, your Honor.

THE COURT: What is the application?

MR. GOLD: At this time, the defendant, Miguel D. Celis, and his lawyer, Peter Leisure, wish to plead guilty to Count 3 of the indictment before your Honor.

THE COURT: What is your name?

THE DEFENDANT: Miguel Daniel Celis.

THE COURT: Do you require an interpreter?

THE DEFENDANT: No, I don't. I speak English.

BY THE COURT:

Q. How old are you?

A. 39.

Q. How far did you go in school?

A. I have a college education.

Q. Whereabouts?

A. I went to the Pierce School of Business Administration, and I was trained by the United States Department of Commerce in Washington, D. C.

Q. What is your occupation?

A. I am a businessman, your Honor.

Q. Are you married?

A. Yes, sir.

Q. Are you currently, or have you recently been, under the care of a physician or a psychiatrist?

A. No, sir.

Q. Have you been hospitalized or treated recently for alcoholism or for narcotics?

A. No, your Honor.

Q. Are you feeling all right physically today?

A. Yes, sir.

Q. Have you gone over Count 3 with your attorney, Mr. Leisure?

A. Yes.

Q. Has he explained to you what the charge is against you in Count 3?

A. Yes, sir.
Q. Do you fully understand it?
A. I do, your Honor.
Q. Are you satisfied with the representation of you?
A. I am.
Q. You are?
A. Yes.
Q. Is he privately retained or assigned?
MR. LEISURE: I am privately retained, your Honor.
Q. Have you told Mr. Leisure everything you know about this matter?
A. Yes, sir.
Q. Have you held anything back from him?
A. No, sir.
Q. Are you ready to plead to Count 3?
A. Yes, your Honor.
Q. Do you want to have the count read?
MR. LEISURE: I have read it to him and explained it to him.
Q. I will read it again if you would like me to read it.
A. I think the matter is already completed.
Q. Do you want to waive the reading of the indictment?
MR. LEISURE: That means to dispense with having to read it again.
A. I don't think it is necessary, your Honor. I read it again and again.
THE COURT: Ascertain how the defendant wishes to plead.
THE CLERK: Do you wish to plead guilty to Count 3?
THE DEFENDANT: Yes.
MR. LEISURE: Your Honor, it may be a technicality that I am raising, but it is our understanding that he would be pleading to aiding and abetting in connection with Count 3.
THE COURT: For the record, shall I enter a plea of not guilty as to all the other counts?

MR. GOLD: Our understanding is that the other counts will be carried open until sentence is imposed, at which time the Government will move to dismiss them.
BY THE COURT:
Q. Do you understand the nature of the charge against you in Count 3? You are charged, along with certain other persons therein named, in a matter within the jurisdiction of the United States Department of State, unlawfully, wilfully, and knowingly facilitating the mailing of, and caused to be mailed, false, fictitious and fraudulent statements on the certificate dated April 22nd, 1976 relating to certain submachine guns to the effect they were to be used by the Armed Forces of El Salvador when, in truth, and in fact, you then and there knew they were to be sold to individuals in the United States?
Do you understand the charge against you?
A. Yes, sir.
Q. Do you understand that the maximum possible penalty provided by law is that you may be sentenced to a term of imprisonment of not more than five years? You may be fined the sum of $10,000 or both.
Do you understand that?
A. I understand that.
Q. Do you understand you have a right to be represented by your lawyer at every stage of the proceedings, and, if necessary, if you have no funds, an attorney would be appointed to represent you? Do you understand that?
A. I understand that.
Q. Do you understand that you have a right to plead not guilty and you have the right to have a speedy and public trial by a jury of twelve people, and on that trial you will have the right of assistance of counsel and the right to confront or cross-examine witnesses against you, and at such trial you cannot be compelled to incriminate yourself or to testify unless you wish to do so? Do you understand that?

A. Yes, your Honor.

Q. Do you understand, further, that if your plea of guilty is accepted today there will not be any trial of any kind, so that by pleading guilty you waive your right to a trial? By that I mean you give up your right to a trial. Do you understand that?

A. Yes.

Q. Do you understand that if you plead guilty the Court may ask you questions as to what you have done?

A. Yes, sir.

Q. Have you been induced to offer to plead guilty by reason of any promises, statements, or predictions by anybody to the effect you would get leniency or special treatment or special consideration if you pleaded guilty instead of going to trial?

MR. LEISURE: Your Honor, if I may say this: In talking with the Assistant United States Attorney, as he has already stated, he indicated the Government would carry the three open counts which the defendant Celis has not pleaded to until the date of sentencing, at which time the Government will move to dismiss those open counts. Also, at that time, the Assistant United States Attorney has told me he would make aware to the Court the extent of cooperation that the Defendant Celis has given to the Government; furthermore, if the defendant has any problems in relocation or in employment following the sentencing, the Government has indicated it will use its best efforts to solve those problems. That is the full extent to which the Assistant United States Attorney and I have conferred.

BY THE COURT:

Q. Do you understand what counsel has just said?

A. Yes, sir.

Q. Is there anything he has omitted? Is there anything you want to tell the Court about?

A. No, sir.

Q. Are you being induced to offer to plead guilty or are you pleading guilty because you are guilty and they can most likely prove it?

A. I am guilty of the charges.

Q. Have you been subjected to any fear or pressure or force, or anything like that, in order to induce you to plead guilty?

A. No, your Honor.

Q. Are you presently under the influence of anything, such as alcohol or drugs, or anything that might affect your ability to understand what you are doing now?

A. No, your Honor.

THE COURT: Does the Government represent it has sufficient evidence to make a prima facie case as to Count 3?

MR. GOLD. Yes, your Honor.

THE COURT: Mr. Leisure, do you know of any valid legal defense available to your client on Count 3, or do you know of any reason why he should not be permitted to plead guilty?

MR. LEISURE: I do not know of any, your Honor.

BY THE COURT:

Q. Is your plea voluntary?

A. Yes, it is.

Q. Does your willingness to plead quilty result from any prior discussions had between the attorney for the Government and yourself or your attorney other than as previously stated today before me in open court?

A. No.

Q. Do you still wish to plead guilty?

A. Yes, your Honor.

Q. Tell me what you did with respect to Count 3 here.

A. Concerning this page, your Honor [indicating]?

MR. LEISURE: The Defendant Celis is indicating a Grand Jury exhibit marked as Exhibit No. 5, which is referred to in Count 3. It is a single-page document, and that is what he is referring to, your Honor.

Q. What did you do with respect to that document?

A. I brought it to the United States, your Honor, and I helped to trace the signature, and I helped in filling it out.

THE COURT: Hand that to the Clerk.

(Pause.)

Q. Did you do that in order to assist somebody in obtaining certain firearms?

A. Yes, sir.

Q. Did you do that intentionally and knowingly?

A. Yes, your Honor.

Q. You knew it was wrong?

A. I knew that the weapons would never go to El Salvador, your Honor.

Q. You knew the use of the certificate was fraudulent?

A. Yes, your Honor.

THE COURT: Is there any further inquiry which counsel believes the Court should make before entering the plea?

MR. GOLD: No, your Honor.

THE COURT: I will accept your plea.

I direct that a full pre-sentence report be made.

Has he been fingerprinted and photographed?

MR. GOLD: He has.

THE COURT: I think, for the record, I ought to enter a not guilty plea on the other counts. I don't insist on doing that.

MR. GOLD: I think that will be better, your Honor.

THE COURT: You can be sentenced by me, if you want, or you can await the arraignment of the other defendants, in which case the entire matter will go to a Judge of this court to be selected by random selection through these wheels we have over here [indicating]. You can do whatever you like on that.

The basic premise of the American Bar Association

minimum standards is that, where possible, the Judge who has presided at the acceptance of the plea ought to impose sentence; however, that't not mandatory. That's found in Section 5.1 of Part 5 of the Standards relating to Administration of Criminal Justice, published by the American Bar Association in 1974. It is not binding on this Court. However, that has been cited favorably by the Court of Appeals and other Courts.

Mr. Leisure, you can agree with the Assistant United States Attorney.

MR. LEISURE: May I confer with them briefly?

THE COURT: Indeed.

[Pause.]

THE COURT: Is he on bail now?

MR. GOLD: He is being held in lieu of $1,000,000 cash.

MR. LEISURE: It is anticipated that the Defendant Celis will testify at the trial, and under those circumstances I think it would be preferable that the Judge who hears the case and hears his testimony be the sentencing Judge.

THE COURT: That is acceptable.

Tomorrow, when I assign the case, I will so indicate that the sentence will be imposed by the assigned Judge. Under those circumstances I will have to leave the date flexible.

If there is no objection the sentencing will be adjourned sine die.

MR. LEISURE: There is no objection to that, your Honor.

THE COURT: What about his bail?

MR. LEISURE: We are willing to continue it at this time. If there is an application in the future with regard to the bail I, of course, would make it.

THE COURT: You are continued. Your bail is

continued in the amount of $1,000,000 cash or surety, and you are remanded to the United States Marshal in lieu of that bail.

Will the marshal bring him to the Probation Office either tomorrow or the next day?

MR. GOLD: We will see that it is done, your Honor.

THE COURT: Take the slip from the Clerk. Take him to the Probation Department sometime tomorrow.

[Time noted: 4:15 p.m.]

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

The blank letterhead of Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A. on which Miguel D. Celis forged the signature of petitioner Rodriguez introduced as genuine by the Government as GX 11.

ESTADO MAYOR GENERAL
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR,
C. A.

FECHA:

ASUNTO:

OFICIO No

DEPENDENCIA

CLASIFIC

USA 33c 475
LD 42-733

9/27/76
GOVERNMEN
76 Cr. 36
EXHIBIT
U. S. DIST. COU
S. D. OF N. Y

11

Rodriguez

The blank letterhead of Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A., on which Miguel D. Celis forged the signature of petitioner Rodriguez and on which Miguel D. Celis and others typed up the typing that appears there, introduced as genuine by the government as GX 15.

ESTADO MAYOR GEN.
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR
C. A.

FECHA 22 De Abril De 1976

ASUNTO:

OFICIO NO.
DEPENDENCIA
CLASIFIC.

San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES:

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS "BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN RE-EXPORTADAS NI CEDIDAS EN PARTE O TOTALMENTE A UN TERCERO.

DIOS, UNION, LIBERTAD

Manuel Alfonso Rodriguez
Coronel De Artilleria D.E.M.
Jefe Del E.M.G.F.A.

BEST COPY AVAILABLE

USA 30-471
(ED. 4-33-71)

GOVERNMENT'S

EXHIBIT
U. S. DIST. COURT

A photostat copy of the blank letterhead of Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A., on which Miguel D. Celis forged the signature of petitioner Rodriguez and on which Miguel D. Celis, and others typed up the typing that appears there, introduced as genuine by the government as GX 19.

ESTADO MAYOR GEN.
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR
C. A.

FECHA: 22 De Abril De 1976

ASUNTO:

OFICIO No. 4
DEPENDENCIA
CLASIFIC.

76 CR 503 KTD

USA 30-471
(ED. 4-33-71)

GOVERNMENT'S

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
SEP 24 1976
19

San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES:

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS "BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN RE-EXPORTADAS NI CEDIDAS EN PARTE O TOTALMENTE A UN TERCERO.

ESTE CERTIFICADO TAMBIEN CUBRE UN MILLON QUINIENTOS MIL CARTUCHOS CALIBRE 5.56mm.

DIOS, UNION, LIBERTAD

The blank letterhead of Estado Mayor General De La Fuerza Armeda, San Salvador, El Salvador, C.A., on which Miguel D. Celis forged the signature of petitioner Rodriguez and on which Miguel D. Celis, and others typed up the typing that appears there, and introduced as genuine by the government as GX 31 which is the charge in the indictment and the "Certificate dated April 23, 1976" bearing the signature of defendant Manuel Alfonso Rodriguez.

ESTADO MAYOR GENERAL
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR,
C. A.

FECHA: 22 De Abril De 1976

ASUNTO:

OFICIO No. 4 966

DEPENDENCIA

CLASIFIC.

San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES:

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS "BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN RE-EXPORTADAS NI CEDIDAS EN PARTE O TOTALMENTE A UN TERCERO.

ESTE CERTIFICADO TAMBIEN CUBRE UN MILLON QUINIENTOS MIL CARTUCHOS CALIBRE 5.56mm.

DIOS, UNION, LIBERTAD

[illegible]

Nos. 77-498 and 77-538

Supreme Court, U. S.
FILED
JAN 6 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

MANUEL ALFONSO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND GERALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
JAMES ROLAND DIFONZO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-498

MANUEL ALFONSO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-538

RAYMOND GERALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a)[1] is reported at 556 F. 2d 638.

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[1]"Pet." refers to the petition for a writ of certiorari filed by petitioner Rodriguez, No. 77-498, upon which petitioner Geraldo, No. 77-538, wholly relies. "App." refers to the Appendix filed by petitioner Rodriguez in the court of appeals, a copy of which we are lodging with this Court, and "Tr." indicates the trial transcript.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1977. Petitions for rehearing were denied on August 30, 1977. The petitions for a writ of certiorari were filed on September 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was legally sufficient.

2. Whether petitioners' claims of prosecutorial misconduct were properly rejected by the court below.

3. Whether the jury's verdict was based on sufficient and properly admitted evidence.

4. Whether petitioner Rodriguez was deprived of the effective assistance of counsel.

5. Whether the district court's jury instructions were proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy (18 U.S.C. 371) to file false documents with the United States Department of State in violation of the Gun Control Act of 1968 (Count One), and of substantive counts charging the filing of false documents with the State Department, in violation of 18 U.S.C. 1001 and 2. In addition to the conspiracy count, petitioner Geraldo was convicted on three substantive charges and petitioner Rodriguez on one (Count Three).[2]

[2]The district court dismissed Counts Two and Four with regard to Rodriguez at the close of the government's case-in-chief. Each of the five other co-defendants pleaded guilty to one of these charges prior to or at the trial.

The district court sentenced Geraldo to concurrent terms of four years' imprisonment on each of the four counts; Rodriguez was sentenced to two consecutive five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial revealed that petitioners were involved in an illegal scheme to sell submachine guns to buyers in this country by filing fraudulent documents with the State Department designed to create the impression that the weapons were being lawfully exported to a foreign government. Three false documents were submitted to the State Department on May 5, 1976, in support of an application for a license to export 10,000 submachine guns to the government of El Salvador. They included an "end use certificate,"[3] a purchase order, and a State Department application form "DSP-5."

The evidence showed that petitioner Geraldo played an instrumental part in getting Rodriguez, the Chief of Staff of the Armed Forces of El Salvador, to carry out the scheme. After meeting with supposed purchasers of the weapons (including several undercover agents), Geraldo represented that he could bribe connections in Central America to supply necessary documentation (Tr. 112-116, 196-200). At later meetings, he discussed the mechanics of the transaction with the agents (Tr. 120-121, 209-212) and, after first indicating that a Guatemalan official would provide the documentation (Tr. 241-242), subsequently stated that petitioner Rodriguez had agreed to assume that role (Tr. 250-251). Later, petitioner Geraldo

[3]An "end use certificate" must be submitted to the State Department in support of an application for a munitions exporting license. The certificate must be executed by a responsible agent of the foreign government and must attest to the ultimate use to which the requested arms will be put.

introduced co-defendant Miguel Celis, the personal representative of petitioner Rodriguez, to the agents and also helped to prepare the needed documents (Gov't. Ex. 31; Tr. 263-264, 271-272, 605-609).

For his part, petitioner Rodriguez agreed to supply an "end use certificate" for 10,000 submachine guns in exchange for $75,000 (Tr. 250-251). On May 15, 1976, Rodriguez and Celis arrived in Mount Kisco, New York, to deliver additional necessary documentation. Shortly after this final meeting, at which Special Agent Joseph F. Kelly of the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms gave Rodriguez and Celis the $75,000 cash that they were to receive for this transaction, all the defendants were placed under arrest (Gov't. Exs. 28A, 28B, 28C; Tr. 308-312).

In a post-arrest statement, Rodriguez stated that he had gone to Mount Kisco to meet with his wife, that he was paid the $75,000 as an act of good will, and that he had received the $75,000 for having signed a petition to the State Department for the export of five guns to his country, for which his country was to pay nothing (Defendant's Ex. A; App. 87SA-96SA).

Special Agent Kelly was the chief witness for the government at trial. He testified about the meetings with the defendants that he had attended in an undercover capacity, all of which were tape recorded. A videotape was made of the final meeting attended by Kelly, at which petitioner Rodriguez accepted the $75,000 payment.

ARGUMENT

1. Petitioners argue (Pet. 63) that the indictment is fatally defective because it fails to explain why the three documents submitted to the State Department on May 5, 1976, were false and because it fails to identify how these

false statements were "material and capable of influencing" the State Department. Petitioners also contend (Pet. 61-62) that Count Three of the indictment does not allege a crime because it utilizes the word "facilitate," which does not appear in the text of either of the applicable criminal statutes (18 U.S.C. 1001 and 2). These contentions were not raised in the district court, and, to the extent that petitioners do not assert that the indictment failed to state an offense, the court of appeals correctly held (Pet. App. 5a) that they are barred by Rule 12(b)(2), Fed. R. Crim. P. In any event, the attacks on the indictment are without merit.

The substantive counts of the indictment (Counts Two, Three, and Four) expressly charge that each document filed at the State Department contained a representation that 10,000 submachine guns were being purchased by the government of El Salvador for its national defense, when in fact the defendants knew this representation to be false. Contrary to petitioners' allegations, therefore, the language of the indictment specified the falsity of these documents with more than sufficient particularity. In addition, it is sufficient to allege, as the instant indictment did, that the false statements were submitted "in any matter within the jurisdiction" of a federal agency. *United States* v. *Adler*, 380 F. 2d 917, 920-922 (C.A. 2), certiorari denied, 389 U.S. 1006. It is not necessary that the indictment further specify the extent to which the false statement might influence the agency in making its decision.[4]

---

[4]Since the State Department requires an "end use certificate" specifying the use to which the foreign government will put the requested arms (see note 3, *supra*), there can be little doubt in the present case of the materiality of the false statements.

Nor is Count Three rendered insufficient because it uses the word "facilitate." As the court of appeals noted (Pet. App. 5a), inclusion of the word was "mere harmless surplusage" because the verb is used in conjunction with, and not as an alternate to, other verbs directly quoted from the statute. In express terms, Count Three charges that petitioners did "willfully * * * cause" an illegal act to be done, which is the precise language of 18 U.S.C. 2(b).

2. Petitioners argue that the case was presented on "false testimony and false evidence knowingly and deliberately introduced at trial by the prosecution" (Pet. 37-38) because the government introduced the "end use certificate" referred to in Count Three as an exhibit at trial and before the grand jury, knowing "that Miguel Celis * * * had *traced* the name of Rodriguez thereon" (*id.* at 38; emphasis in original). To show further governmental misconduct, petitioners also contend (Pet. 57-61, 67) that the prosecution, in its summation, erroneously referred to matters outside the record and improperly alluded to the failure of the appellants to testify. These claims find no support in the record.

The claim that the prosecution advanced the false theory that Rodriguez actually signed the end use certificate is directly contrary to the representations of government counsel at trial. The United States Attorney expressly stated to both the district court and defense counsel during the trial that the government did not claim that Rodriguez had personally signed the document (Tr. 256).[5] Moreover, the jury was expressly told in the

[5]The government did claim that the signature had been placed on the "end use certificate" with Rodriguez' full knowledge and authorization (Tr. 256). The good-faith basis for that claim is contained in the grand jury testimony of co-defendant Celis, which was submitted under seal to the district court in response to an unsuccessful post-trial motion raising these same allegations of misconduct.

government's summation that the government did not claim that Rodriguez signed the end use certificate (Tr. 764). Indeed, this concession was seized upon by Rodriguez' trial counsel, who argued in summation that Rodriguez was obviously innocent since it had been necessary "to forge or trace" his signature (Tr. 806).[6] As the court of appeals observed (Pet. App. 6a): "No reasonable person could doubt that the prosecution's consistent position was that Rodriguez' name on the certificate was there with his full knowledge and authorization, but not as a result of his penmanship."

Petitioners' allegations of prosecutorial misconduct based upon arguments made during summation are also unsupported. To begin with, we note that petitioners made no objection to these arguments at trial. Moreover, although petitioners now assert that the government "introduc[ed] to the jury matters that were not in evidence", (Pet. 59), an examination of these charges shows that in each instance the prosecutor merely made simple inferences from the facts in evidence. See *United States* v. *Steinberg*, 551 F. 2d 510, 515 (C.A. 2).

Similarly, petitioners' charge that the government continually referred to "undisputed" evidence, and so commented unfairly on petitioners' failure to take the stand, is undercut by the fact that in each of the statements so challenged, the United States Attorney was merely commenting that he believed his assessment of the

[6]Petitioners' claim that the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83, by not disclosing to the defense that "Miguel D. Celis had forged the signature of Rodriguez" on the end-use certificate (Pet. 41) carries little weight, since defense counsel conceded to the district court that he had already been told that Rodriguez' signature had been placed on the document by someone else (Tr. 720).

evidence would not be disputed by defense counsel in their summations (*e.g.*, Tr. 737-738). In any event, when the credibility or sufficiency of the government's evidence has been attacked, the prosecutor may properly assert in summation that factual matters are "unrebutted" or "uncontradicted" (*United States* v. *Rodriguez*, 545 F. 2d 829, 832 (C.A. 2), certiorari denied, 429 U.S. 1063; see *Lawn* v. *United States*, 355 U.S. 339, 359-360 n. 15), and nothing in the summation was " 'of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *United States* v. *Williams*, 521 F. 2d 950, 953 (C.A. D.C.), quoting from *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).[7]

Finally, there is no basis for petitioners' objection (Pet. 59, 67) to the government's argument that agent Kelly had employed proper undercover techniques in the investigation of this case. Throughout his cross-examination of Agent Kelly, trial counsel for petitioner Geraldo repeatedly insinuated (a) that the agent had enlisted the services of underworld criminals (Tr. 354, 367, 415); (b) that thorough investigative techniques had not been followed by government agents (Tr. 383, 414); and (c) that undercover agents had threatened some or all of the defendants (Tr. 394). In summation, he accused the government of "selective prosecution" (Tr. 783) and of conducting Orwellian surveillance upon the defendants (Tr. 786). In addition, Rodriguez' trial attorney, in his closing remarks, characterized the efforts of Agent Kelly and his fellow agents as "sloppy investigative work" and urged the jury to "protect yourselves and us from that kind of work" (Tr. 812). Consequently, "in the context of

[7]We do not believe, therefore, that it is necessary for the Court to defer consideration of this petition pending disposition of *Lockett* v. *Ohio*, No. 76-6997, certiorari granted, October 11, 1977.

the trial and balanced against the tactics of the defense lawyers," the comments of the United States Attorney in summation constituted a permissible attempt to offer a rebuttal. *United States* v. *Tramunti*, 513 F. 2d 1087, 1119 (C.A. 2), certiorari denied, 423 U.S. 832.

3. Petitioners advance various claims that the evidence adduced at trial was either inadmissible, unconstitutionally obtained, or insufficient. None of these claims withstands analysis.

a. Rodriguez alleges (Pet. 48-55) that the videotape of his May 15, 1976, meeting in Mount Kisco (Gov't. Exs. 28A, 28B) and his post-arrest statement (Defendant's Ex. A) should have been suppressed by the district court under authority of *Miranda* v. *Arizona*, 384 U.S. 436. However, Rodriguez did not object either before or during trial to the offer of either exhibit into evidence; indeed, he joined in the government's offer. Thus he is precluded from objecting to this evidence on appeal. Rule 12(b)(3), Fed. R. Crim. P.

Even if Rodriguez had interposed timely objections, he would not have been entitled under *Miranda* to have either the videotape or his post-arrest statement excluded. There was no constitutional requirement that the undercover agents advise Rodriguez of his *Miranda* rights during the videotaped meeting, since Rodriguez was not in custody at any time during the meeting. *Oregon* v. *Mathiason*, 429 U.S. 492, 495. Where the suspect is not even aware that he is in the presence of law enforcement officers, as was the case here, *Miranda* does not apply. *Beckwith* v. *United States*, 425 U.S. 341, 347. Although *Miranda* would be applicable to his post-arrest statement, it is evident from the statement itself that Rodriguez was properly and timely advised of each of his *Miranda* rights

and that he voluntarily agreed to continue answering questions, even after being told that he could "stop at any time" (App. 87SA).[8]

b. Petitioners contest the admission into evidence of the various audio tape recordings made during the undercover negotiations on the ground that they were obtained "without any Warrant" (Pet. 66), and they challenge the admission of the submachine gun (Gov't. Ex. 7) that was demonstrated in North Carolina for co-defendant Dominick Cagianese and the undercover agents, on the ground that it was introduced solely to "inflame the jury" (Pet. 65). The admission of these exhibits was, however, clearly proper.

The warrantless recording of an oral communication violates neither the Constitution nor federal law when it is made with the consent of one of the parties to the communication. See 18 U.S.C. 2511(2)(c) and *United States* v. *White*, 401 U.S. 745. As the audiotapes introduced into evidence at the trial were all recorded with the knowledge and consent of Agent Kelly, who was present during all of the recorded meetings (Transcript of *Voir Dire*, dated September 20, 1976, at 8), petitioners cannot complain that a warrant was not obtained.

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[8]Petitioner Rodriguez' assertion that at some unspecified time and place he had asked for permission to make telephone calls to "[the] president of the Republic of El Salvador, the Defense Minister, the Ambassador, and the United States Armed Forces Chief of Staff" (Pet. 54) finds no support whatever in the record. After being advised in Spanish that "[i]f you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed," Rodriguez did not request an attorney but continued to answer the questions put to him (App. 87SA).

The admission into evidence of the demonstration model of the submachine gun was also proper, since it was plainly relevant to the issues at trial and carried little risk of serious prejudice to petitioners. The weapon served as physical evidence corroborating Agent Kelly's testimony about the test demonstration in North Carolina, and proof of its physical characteristics as an "automatic weapon" helped to show that one of the objectives of the conspiracy was to violate the Gun Control Act of 1968. On the other hand, the defendants could hardly have suffered any genuine prejudice from the introduction of a single gun into evidence (which the jury was never permitted to touch or view from a near distance (Tr. 236), since the charges against petitioners involved a plan to sell 10,000 times that number on the basis of false documentation. Under the circumstances, the trial court plainly did not abuse its discretion in admitting the submachine gun into evidence.

c. Rodriguez relies on *Bruton* v. *United States*, 391 U.S. 123, to support his contention that the introduction of "mountains of hearsay" deprived him of a fair trial (Pet. 64). However, *Bruton* concerned problems that arise where a co-defendant's out-of-court post-arrest statement inculpates another defendant and is admitted into evidence without the declarant being available at trial for full and effective cross-examination. See *Nelson* v. *O'Neil*, 402 U.S. 622, 627. Even assuming that Rodriguez raises this claim for the benefit of petitioner Geraldo (who incorporated those claims by reference), there were no such problems here, since Rodriguez' post-arrest statement (App. 87SA-96SA) did not mention Geraldo. The "hearsay" evidence offered at the trial—consisting of the tape recorded admissions of the defendants and the statements of co-conspirators in furtherance of the conspiracy—was relevant and admissible, notwithstanding

the fact that there was a great deal of it. Fed. R. Evid. 801(d)(2)(A) and (E); *Lutwak* v. *United States*, 344 U.S. 604, 617.

d. Rodriguez further claims that there was insufficient independent proof of his participation in the conspiracy because, while "[t]he conspiracy charged * * * had already been consummated as of May 5, 1976," he was not "in view at all" until May 15, 1976 (Pet. 57). However, the conspiracy was not consummated by the mere filing of the documents at the State Department on May 5, 1976, since its primary objective—to sell 10,000 submachine guns illegally—had not yet been attained. See *Grunewald* v. *United States*, 353 U.S. 391, 401-402. Consequently, evidence of Rodriguez' pre-arrest admissions and conduct at the videotaped meeting of May 15, 1976, was clearly admissible to prove his independent participation in the conspiracy charged in Count One. This evidence in turn was more than sufficient to warrant the introduction of his co-conspirators' hearsay declarations. See *United States* v. *Calabro*, 449 F. 2d 885, 889 (C.A. 2), certiorari denied, 404 U.S. 1047. Thus, the evidence fully supported the verdict of guilty on the conspiracy count.

4. Petitioner Rodriguez also claims (Pet. 41-48) that his retained attorney at trial was so incompetent as to deprive him of the effective assistance of counsel. The court of appeals correctly concluded (Pet. App. 7a), however, that this contention is without support in the record.

Petitioner Rodriguez first argues that his trial counsel failed to conduct a proper investigation to discover that the signature of Rodriguez on the end use certificate had been traced onto that document by co-defendant Celis, and that counsel did not oppose the introduction of this "false evidence" at trial (Pet. 42-44). The record demonstrates, however, that petitioner's counsel was well

aware that Celis had placed Rodriguez' signature on the certificate and that counsel did oppose the introduction of the certificate into evidence until he had been assured by the government that it would not contend that Rodriguez had actually signed the document (Tr. 253-257, 807).

Petitioner Rodriguez also claims that his counsel acted incompetently in failing to object to, or attempt to obtain a limiting instruction on, the videotape, audiotapes and "triple hearsay" testimony of Agent Kelly (Pet. 44). However, both the tapes and the agent's testimony contained the admissions of petitioner and statements of his co-conspirators made in furtherance of the conspiracy. The admission of this evidence is proper. Rule 801(d)(2)(A) and (E), Fed. R. Evid.[9] Similarly, petitioner's contention that his counsel was incompetent in not objecting to the indictment must fail because, as indicated above (pp. 5-6, *supra*), such an objection would have been frivolous.

The claim that counsel in his summation ineffectively argued Rodriguez' case to the jury (Pet. 44-45) is highly speculative. This kind of assertion affords no basis for relief unless it is demonstrable that the representation provided fell outside the "range of competence demanded of attorneys in criminal cases." *Tollett* v. *Henderson*, 411 U.S. 258, 268. No such argument can reasonably be made here.[10] Similarly, Rodriguez' objection to counsel's pretrial investigation and to his alleged failure adequately to

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[9]Moreover, a motion to suppress the tapes had been made at the start of the trial by the attorney for co-defendant Robert Michaelson. This motion, which was deemed by the district court to have been made by all defendants, was denied (Transcript of *Voir Dire*, dated September 20, 1976, at 8-12, 106).

[10]The district court was quite impressed by trial counsel's performance in this case. In a memorandum opinion filed on March

research the law applicable to this case are unsubstantiated assertions of facts outside the record and are therefore insufficient to raise even a colorable claim of ineffective assistance of counsel. *United States* v. *Wisniewski*, 478 F. 2d 274, 284 (C.A. 2).

5. Finally, petitioners claim that the district court failed to instruct the jury properly on conspiracy and on reasonable doubt (Pet. 56-57, 63-64).

Their first contention—that the district judge should have preliminarily charged the jury concerning the admissibility of co-conspirators' statements—was never brought to the district court's attention during the trial and, consequently, may not be raised on appeal. See Rule 30, Fed. R. Crim. P.; *United States* v. *Moore*, 505 F. 2d 620, 623-624 (C.A. 5), certiorari denied, 421 U.S. 918. Moreover, this claim overlooks the fact that the district court did give a preliminary warning to the jury that it was accepting hearsay testimony "subject to connection,"

11, 1977, denying Rodriguez bail pending appeal, the district judge wrote (slip op. 2-3):

> The final argument [of Rodriguez on appeal] apparently is a claim of incompetence by trial counsel for the defense. I have been around the federal courts for the past twenty years as prosecutor, defense attorney, Regional Administrator of the Securities and Exchange Commission, and as a judge, and I have never seen such a totally baseless and spurious claim. Trial counsel for Col. Rodriguez recognized that he was fighting an uphill battle, but conducted himself in a totally professional manner. His reputation for competence in this courthouse is of the highest order, and it is well merited. The attack on that reputation by appellate counsel can only be based upon a lack of understanding of the tactics and strategy of an able trial attorney.

and that at the end of the trial "[i]f there is no connection whatsoever, I want you to take out your mental erasers and forget it" (Tr. 65).[11]

Similarly unsupported is the challenge to the district court's reasonable doubt charge (App. 27A-29A), also raised for the first time on appeal. See *United States* v. *Acarino*, 408 F. 2d 512, 517 (C.A. 2), certiorari denied, 395 U.S. 961. The language in the district court's charge to which petitioners object,[12] when read in the context of

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[11] In its charge to the jury at the conclusion of the trial, the district court gave a full explanation of the requirement of independent evidence (App. 40A, 44A):

> I mentioned to you that certain evidence was taken subject to connection. I told you at the time I would explain it in detail to you.
>
> If you are satisfied beyond a reasonable doubt that a conspiracy existed and that a particular defendant was a member, then the acts and declarations of any other person whom you also find was a member of the conspiracy made during the existence of the conspiracy and in furtherance of its objects are the acts and declarations of all the members of the conspiracy, even though they were not present.
>
> • • • • •
>
> As I explained, statements and acts of a conspirator, of the alleged conspirator, each alleged conspirator, must be considered by you to determine whether he knowingly, wilfully and intentionally joined in the conspiracy, if you find one to exist.
>
> If you find that he did, then statements or acts of other proven co-conspirators can be considered only if in furtherance of and during the existence of the conspiracy. Proof of a subsequent statement is not and cannot be the substitute for proof of the crime charged in this indictment.

[12] "[N]ot proof to a positive certainty or beyond all possible doubt. If that were the rule, it would be practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to a mathematical computation. As a consequence, the law is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt" (Tr. 867).

the entire charge, *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, more than adequately conveys the concept of reasonable doubt in language that has received repeated judicial approval. See, *e.g.*, *United States* v. *Barrera*, 486 F. 2d 333, 339 (C.A. 2), certiorari denied, 416 U.S. 940; *United States* v. *Kirk*, 534 F. 2d 1262, 1279 (C.A. 8). Further review of this issue is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-498 and 77-538

MANUEL ALFONSO RODRIGUEZ, Petitioner

v.

UNITED STATES OF AMERICA

RAYMOND GERALDO, Petitioner

v.

UNITED STATES OF AMERICA

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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UNITED STATES SUPREME COURT
OCTOBER TERM, 1977

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MANUEL ALFONSO RODRIGUEZ,
Petitioner,

v.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

This reply brief is submitted in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

POINT I

THE GOVERNMENT INDICTED, TRIED, AND CONVICTED THE PETITIONER RODRIGUEZ BY THE KNOWING USE OF FALSE MATERIAL EVIDENCE

The government's case against Rodriguez on both count 1 and count 3 was based on the charge in the indictment that *Rodriguez signed the end use certificate*, which was described in the indictment as "a certificate dated April 22, 1976 *bearing the signature of defendant Manuel Alfonso Rodriguez.*" (Pet. 12, 16) The government's *entire* case against Rodriguez was tried on false evidence that *Rodriguez signed the end use certificate.* (Pet. 17-19; 12a-20a; infra).

The government obtained the conviction of Rodriguez upon false evidence that *Rodriguez signed the end use certificate.* (Pet. 17-39; 12a-20a; *infra*.)

The government knew even *before* the return of the indictment that Miguel Celis had *forged* Rodriguez' "signature" onto three blank sheets of letterhead paper of the office of the Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, i.e., the office of the Chief of Staff of the Armed Forces of El Salvador. (Pet., pp. 12a-20a). This later became the end use certificate (Tr. 253-254) (Pet. 21a-24a).

The government concealed these facts. It *never* disclosed either to the trial court, or to the jury, or to the defense counsel, *that Miguel Celis had forged Rodriguez "signature" on it by tracing it thereon.* Even though at all times it *knew* these facts (Pet. pp. 12a-20a). These facts were discovered and exposed by present appellate counsel after the judgment of conviction was entered during the preparation of the appeal therefrom (Pet. 18-19; 12a-20a).

After these facts were exposed, the government could not

deny that Miguel Celis had forged Rodriguez' signature on the end use certificate (Pet. pp. 12a-20a).

It is undisputable that had the government disclosed this critical exculpatory evidence, namely, that *Miguel Celis had forged Rodriguez' signature onto the end use certificate* (Pet. pp. 12a-20a), Rodriguez would have been acquitted (See Point II, *infra*).

Instead of disclosing the fact that Miguel Celis had forged Rodriguez' "signature" on the end use certificate, the prosecutor deliberately, aggressively, persistently and consistently argued and presented evidence to the jury and the trial court that *Rodriguez signed the end use certificate*, knowing those arguments and evidence were false (Pet. 17-19).

The government seeks to avoid the consequences of its grave prosecutorial misconduct by the disingenous argument that:

> "The claim that the prosecution advanced the false *theory* (sic) that Rodriguez actually signed the end use certificate *is directly contrary to the representations (sic) of government counsel at trial. The United States Attorney stated to both the district court and defense counsel during the trial that the government did not claim that Rodriguez had personally signed the document* (Tr. 256)." (Resp. Br. pp. 6,7). (Italics and matter in parenthesis added.)

The government's brief carried footnote 5, which further asserted that the government did claim that the signature had been placed on the "end use certificate" with Rodriguez' full knowledge and authorization (Tr. 256). . . ." (Italics and matter in parenthesis added.) The government continued the quoted footnote statement with the non-sequitur that:

> "The good faith basis for that claim is contained *in the grand jury (sic)* testimony of co-defendant

> Celis, which was submitted under seal to the district court in response to an unsuccessful post-trial motion raising these same allegations."[1] (Italics and matter in parenthesis added.)

The record does not support, and totally discredits, the government's assertions to this Court. It is notable that even the government does not claim that there is anything in the *trial record* to support its assertion of a "good faith basis for that *claim* (that) the signature had been placed on the 'end use certificate' with Rodriguez' full knowledge and authorization." (Resp. br. fn. 5). (Matter in parenthesis and italics added.) It points only to undisclosed *grand jury* testimony of Miguel Celis. The fact is that there is not one scintilla of evidence presented by the government *in the trial record*—that someone else, *other than Rodriguez, signed the end use certificate. All of the evidence* presented by the prosecutor at the trial was that *Rodriguez signed the end use certificate.* There is no evidence in the trial record for the government's assertion in this Court that "the government did not *claim* that Rodriguez signed the end use certificate." (Res. Br. pp. 6, 7).

The trial record shows that the prosecutor deliberately, aggressively, willfully, and repeatedly, *claimed, contended, argued and represented* that *Rodriguez had signed the end use certificate* in his opening statement to the jury (Tr. 8, 9, 16, 17, 18, 19, 25, 30), in the presentation of evidence to the jury (Tr. 251-254, 264, 266-268, 270-272, 277, 279, 298-299, 300, 484, 486, 571, 584, 586, 607-609, 585-593, 623-627, 630-631), in his arguments to the trial court at end of trial

1. Prior to the perfection of the appeal to the Court of Appeals, Rodriguez filed a petition for a writ of habeas corpus to the District Court which raised this and other issues. The District Court denied the petition *without prejudice* by reason of the pendency of the appeal. The government's opposition to the petition for a writ of habeas corpus was that the same issues were pending appeal.

(Tr. 715-718, 720-721), in his requests to the trial court to charge the jury (Tr. 727, 891-892, 894), in his closing statements to the jury (Tr. 741, 742, 748-750, 752, 762, 764-766, 849-850).

The trial record shows that the so-called "representations of government counsel" were made at a chambers conference, *out of the presence of the jury* (Tr. 254-258). The jury *never heard* any of the "representations" made by that prosecutor (Tr. 254-258). This chambers conference occurred on September 24, 1976, the fourth day of the trial (Tr. 240). The government's chief witness, Special Agent Joseph Kelly, was on his *second day* of direct examination (Tr. 51, 175, 240, 254).

Just prior to that chambers conference, the prosecutor had elicited hearsay testimony from Special Agent Kelly that *Rodriguez had signed the end use certificate.* (Tr. 252-254). Agent Kelly had just testified that on May 2, 1976 he had met Miguel Celis and Eduardo Suarez at a restaurant in Westchester County and that there, *Miguel Celis* told him that *Rodriguez had signed three blank letterhead sheets of paper which Celis had "removed from a folder he was carrying, three blank letters which had formal letterheads from El Salvador and which at the bottom of the page was signed with a signature."* (Tr. 252-254). The prosecutor had asked Special Agent Kelly just prior to that chambers conference:

> "Q. Was there any discussion of why the document was blank?
>
> A. Yes, sir. They explained that *Colonel Rodriguez had signed the document,* but they didn't want him to fill in any information because *they* wanted it done by us so we would give the proper identification of what we require so that it would pass through the State Department without any problems. (Tr. 254)
>
> Q. Would you look at the document that Mrs.

Alexander is showing you, which has been marked as *Government's Exhibit 11*, and tell us what that is?

A. There were three copies that Mr. Celis had brought with him of the document I described. *He had given me one of the copies in blank with a signature at the bottom and this is a copy.* (Tr. 254)

Q. In other words, he brought three blank letterheads with a signature on it, and that is one of them is that correct?

A. Yes, that is correct, sir. (Tr. 254)

Mr. Fiske: We offer it in evidence, Your Honor. (Tr. 254).

Mr. Lang: May counsel see it, please, Your Honor?

The Court: Sure.

Mr. Hallinan: May I have a short conference with Mr. Fiske *privately?* It doesn't involve anyone leaving the courtroom. (sic!) (Tr. 254).

Mr. Lang: I think conference relating to exhibits or potential exhibits should be with all parties in the courtroom. (Tr. 255)

The Court: Mr. Lang objects. If you and Mr. Fiske went to talk about it, come on inside. I will listen, too." (Tr. 255) (Italics and matter in parenthesis added.)

Government Exhibit 11, which was the subject of the robing room conference, is reproduced in Petition, page 21a. It is a blank letterhead sheet of paper bearing a "signature". Special Agent Kelly had just testified that Miguel Celis had said to him on May 2, 1976 that the signature was signed by Colonel Rodriguez, that "Colonel Rodriguez had *signed the document.*"[2] [*Tr. 253-254*].

2. The singular "document"—apparently a typographical error in the trial minutes and should be in the plural, since the reference to the three letterhead sheets of paper is clear.

Thereupon, the robing room conference took place *outside of the presence of the jury* (Tr. 255), as follows:

"Mr. Hallinan: Are you going to claim (sic) that the Colonel physically (sic) signed *this* document?"[3] (Tr. 255)

The prosecutor did not respond to that question but evaded it (Tr. 255):

"Mr. Fiske: I don't think we have to get to that.

Mr. Hallinan: We do for any voir dire that I might have.

The Court: Let me see it.

Mr. Fiske: *No, we are not going to claim that he signed it.*[4]

Mr. Hallinan: Then, I have no objection." (Tr. 257) (Italics and matter in parenthesis added.)

The prosecutor then immediately back tracked and altered his statement:

"*Mr. Fiske: Let's put it this way: we are not*

3. It was also strange and bizarre for defense trial counsel for Rodriguez to have sought a private conference with the prosecutor in open court, and to have sought to exclude the court and defense counsel for Geraldo therefrom. Mr. Hallinan needed only to have objected to the introduction of the prior, gravely prejudicial, hearsay testimony by Special Agent Kelly that Celis told him that Colonel Rodriguez had *signed* those three blank letterhead sheets of paper in order to have excluded it as to Rodriguez. Similarly, Mr. Hallinan needed only to have objected to the proferred Government Exhibit 11 in order to have excluded it as to Rodriguez. A simple objection would have required the government to prove the *authenticity* of the "signatures" of Rodriguez on those three blank sheets of letterhead paper. The government had not taken any handwriting exemplars of Rodriguez. It had no handwriting experts prepared to testify that they bore Rodriguez' signature. The simple objection would have led an effective trial counsel to the exposure of the government's misconduct. Also, a simple check of the court files in this case would have revealed the confession of Miguel Celis that *he had* forged Rodriguez' signature on the end use certificate. (Pet. 12a-20a).

4. "It" is a reference to Government Exhibit 11, Petition, p. 21a.

going to introduce any evidence that he physically signed it.[5]

The Court: Let's cut through all the niceties of going back and forth and asking questions and not answering them. Mr. Fiske, a very simple question: what Mr. Hallinan (Tr. 255-256) basically wants to know is, are you going to introduce handwriting evidence that this handwriting, if it be handwriting,[6] is the handwriting of the Colonel?

Mr. Hallinan: Or are they going to claim that because *he denies that is his signature.*

Mr. Fiske: Your Honor, we are not going to claim (sic!) that Colonel Rodriguez *himself* wrote *that* signature on *that* piece of paper.[7] On the other hand, we are very definitely *claiming* (sic!) *that signature appears on that paper*[8] *with the full authorization and knowledge of Colonel Rodriguez.*[9]

Mr. Hallinan: All right. I thought I understood that.(!!)

The Court: The reason he has a right to know about it now is whether *he* (sic) should call handwriting experts or scientific people.[9a]

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5. The prosecutor's statement was not true. The prosecutor repeatedly presented evidence that Rodriguez had signed not only Government Exhibit 11, but also Government Exhibit 15, 19, and 31 (Pet. 21a-24a, as show *infra*.

6. See footnote 3.

7. The prosecutor was carefully limiting his statement to Government Exhibit 11 (see, Pet. 21a). But his statement was not truthful. The prosecutor had elicited testimony from Agent Kelly that Miguel Celis said that Rodriguez had signed that document and two others like it (Tr. 253-254).

8. See footnote 7.

9. See *infra*, Point II. See also, *infra* pp. 16-19; 22, 23; 26, 27; see also footnotes 22, 26-28.

9a. Rodriguez had no burden to prove that it was not his handwriting. It was a prosecution burden of proof. See also, footnote 3.

Mr. Hallinan: There is another document that I did talk to them about and they told me this with respect to the other document, too, so I dropped my idea of having a handwriting expert.

Mr. Fiske: There is another document that will go into evidence that I understand Mr. Hallinan is ready to stipulate that was, in fact, signed by Colonel Rodriguez (Tr. 256) (Tr. 257).

Mr. Hallinan: Yes.

Mr. Fiske: We are all set. Just so we understand, this document can go into evidence?

Mr. Hallinan: *I have no objection to that document.*[10]

The Court: Do you, Mr. Lang? It is a blank piece of paper--

Mr. Hallinan: How are you going to describe it, *with the name of Colonel Rodriguez?*

Mr. Fiske: *There has been nothing said as to whose name that is.*[11]

Mr. Fiske: There has been testimony already. Mr. Geraldo[11a] *said Mr. Rodriguez signed it. Mr. Geraldo* send it at the meeting, and that is *not* what *I* am saying." (Tr. 257).[12] (Italics and matter in parenthesis added.)

The robing room conference ended with that ambiguous

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10. Government Exhibit 11 (Tr. 254, 258) (Pet. 21a).

11. The record shows that this statement is not true. Special Agent Kelly had just *testified that Celis and Suarez* (not *Geraldo*) had told him on May 2, 1976 that Colonel Rodriguez had signed *that* paper in blank and two others like it in blank (Tr. 253-254).

11a. See footnote 11 and 12b.

12. The prosecutor did indeed say that, and he repeatedly said that and introduced evidence that Rodriguez signed all of those Government Exhibits 11, 15, 19 and 31 (Pet. 21a-24a, 17-39), and herein.

bit of semantics by the prosecution (Tr. 257).*

The prosecutor, who, when pressed had represented ambiguously that "*we are not going to claim* that Rodriguez himself wrote that signature on that piece of paper (Tr. 256), namely, Government Exhibit 11 (Pet. p. 21a), *in that same robing room conference* regarding the offer into evidence of Government Exhibit 11 (Tr. 254, 258), did indeed *claim* that *Rodriguez did sign it.* The prosecutor stated: "*There has been testimony already. Mr. Geraldo*[12a] *said Mr. Rodriguez signed it.*" (Tr. 257). The prosecutor disingenuously added his semantics that "Mr. Geraldo[12b] said that at the meeting, and that is not what *I* am saying." (Tr. 257). But *he was indeed* saying that; he said it before the robing room conference, at the robing room conference, and after the robing room conference. (*Supra*, pp.3, et seq.).

The jury never heard any of the robing room statements of the prosecutor. When the trial judge and defense counsel returned to the courtroom, the court stated to the jury:

> "The Court: Okay, folks: I told you that matters of law logistics were matters for me. We just took care of a matter of logistics." (Tr. 257).
>
> Mr. Hallinan thereupon stated:
>
> "Mr. Hallinan: On the basis of our conversations, I have no objection to the introduction of that document.
>
> The Court: Mr. Lang? (Tr. 257) (Tr. 258)
>
> Mr. Lang: No objection, Your Honor.

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*The trial transcript apparently omitted the word "not". The response of the prosecutor confirms this. Also, see Tr. 584-585.

12a. See footnotes 11 and 23.

12b. Special Agent Kelly testified that *Miguel Celis*, not Geraldo, had told him that Rodriguez *signed* those three letterhead sheets of paper in blank (Tr. 253-254).

> The Court: Mark it in evidence. (Government's Exhibit 11 received in evidence.)
>
> Mr. Fiske: May I show it to the jury, Your Honor?
>
> The Court: Sure." (Tr. 258)

Immediately after the jury had examined Government Exhibit 11, the prosecutor elicited *further testimony from Special Agent Kelly*, that the "signature" of Rodriguez on those three blank sheets of letterhead paper, which later were typed up into the end use certificates (Pet. pp.21a-24a), was the "real" signature of Rodriguez, "that the signature is real" (Tr. 258) if "Colonel Rodriguez is real" (Tr. 258).

> (Tr. 258) "Mr. Fiske: Q. Agent Kelly, after Mr. Celis and Mr. Suarez came with Mr. Geraldo back to the meeting with this document that has just been shown to the jury, was there any discussion in their presence about the payment of the money?
>
> A. Yes.
>
> Q. Would you tell us about that?
>
> A. We again stated with Celis and Suarez present that we did not want to front any money or advance any money. We explained that we didn't know whose signature this was. It could be real or it could be unreal. We didn't know who Colonel Rodriguez was. *Michaelson responded that if the deal is legitimate, that is if the signature is real, Colonel Rodriguez is real.* If it goes to the State Department and the license is disapproved for some other reason, he would (Tr. 259) reimburse us the $25,000 that we advanced. However, if the signature was not correct, or there was no Colonel Rodriguez, he would give us any moneys that we laid out in advance." (Tr. 259). (Italics and matter in parenthesis added.)

The prosecutor elicited *further* testimony from Special Agent Kelly that Colonel Rodriguez was the one who was the actual signer (Tr. 259-262). Special Agent Kelly testified that he had made *a tape recording* of the conversation on May 2, 1976 at which Miguel Celis had stated that Colonel Rodriguez had *signed* the three sheets of letterhead paper in blank (Tr. 261-262). That tape was received in evidence as Exhibits 12 and 12B and played to the jury (Tr. 262). The tape played the voice identified by Special Agent Kelly as that of Miguel Celis, Special Agent Kelly, Michaelson, and Cagianese saying that those blank letterhead papers (GX 11, 15, 19, and 31) were *"signed by Rodriguez."* (Pet. pp. 23-25). After the playing of the tape (GX 12, 12B), the prosecutor continued to elicit testimony from Special Agent Kelly that *Rodriguez signed those three sheets of letterhead paper in blank* by the testimony of Kelly that on May 2, 1976 Celis "produced a copy of the blank end use certificate and handed it to Frank Alvarez for his inspection:

> Q. Agent Kelly when you refer to the blank end use certificate, what are you referring to?
>
> A. *The letter on the formal letterhead that was signed with a signature at the bottom*, but *the body of it was left blank*. Mr. Geraldo explained to Mr. Alvarez that we needed to know what they wanted put in the body of the letter. Alvarez began dictating the body of the letter to Mr. Geraldo who wrote it down on a yellow legal pad. When this was completed Mr. Geraldo asked Mr. Alvarez if he could use the typewriter in their offices at Mott Haven to type it up. Alvarez said 'No, No, I don't want it done here. Take it back to Wittington and have it done.'
>
> Q. In what language did Mr.Alvarez dictate to Mr. Geraldo?
>
> A. Spanish, Sir. We agreed that Geraldo, Celis

> and Suarez would go to Wittington's office and complete the needed form, and I told them I would join them back later that afternoon so that all documents could be completed and submitted to the State Department.
>
> Q. Did you wear a Nagra tape recorder for that meeting? (Tr. 263)
>
> (Tr. 264) A. Yes, Sir.
>
> Q. Did you make a tape recording of it?
>
> A. Yes, sir.
>
> Q. Is Exhibit 13 that tape?
>
> A. Yes, Sir." (Tr. 265)

Portions of that tape recording on May 3, 1976 are reproduced at page 25 of the Petition. Those tapes show that Special Agent Kelly declared that Colonel Rodriguez already signed those letterhead papers. (Stagg was a "confidential informant" for the government, Tr. 23). Thus, on that tape played by the prosecutor to the jury, Special Agent Kelly and Stagg vouched to Alvarez for the genuineness of the signature on those papers, that *"Colonel Rodriguez*, he's alleged to be the Chairman of the Joint Chiefs of Staff . . . The Boss . . . For San Salvador, El Salvador . . . *already signed them . . . his signature on the bottom.*" (Pet., p. 25). The prosecutor introduced into evidence as Exhibit 14 another Nagra tape alleged to have been made by Special Agent Kelly on the afternoon of May 3, 1976 (Tr. 267). The conversation between Michaelson and Special Agent Kelly repeated that the end use certificate was *"signed by Rodriguez and empty in the middle."* (Pet. p. 25).

The prosecutor elicited from Special Agent Kelly that the blank letterhead paper signed by Rodriguez (Tr. 252-254) was typed into "the completed end use certificate" (Tr. 267) on May 3, 1973 in New York:

> "Q. Let's go to the meeting with Mr. Michaelson

at the end of the day on May 3, and let me ask you whether Mr. Michaelson brought any documents with him to the meeting?

A. Yes, Mr. Michaelson arrived and gave to me the completed end use certificate and a purchase order from San Pan Trading Corporation to Mott Haven for 10,000 Bushmaster machine guns." (Tr. 267)

The prosecutor continued this same deliberate course of conduct of "claiming" and representing to the court and to the jury, and to defense counsel, that *Rodriguez signed those three letterhead sheets of paper in blank* which were typed up in New York into the end use certificate. (Tr. 264, 267; *supra*)

The prosecutor introduced Government Exhibit 15 into evidence without objection (Pet. p. 22a) (Tr. 270). That exhibit was *typed* in Spanish (Tr. 270-271). The prosecutor then had the official court Spanish language translator translate Government Exhibit 15 into English (Tr. 271-272). As the exhibit shows (Pet. p.22a), the "signature" has *typed* beneath it the *identification* of the signature, to wit: "Manuel Alfonso Rodriguez, Coronel De Artilleria D.E.M., Jefe Del E.M.G.F.A."[13] By the introduction of Government Exhibit 15 by the prosecutor with that *typed* identification of the "signature", the prosecutor was representing to the trial court and jury that that "signature" there, was *signed by Rodriguez.*

The prosecutor did not stop there. He had the official court Spanish translator translate that Government Exhibit 15 into English, as follows:

> "Mr. Hoffman: It has an *official* letterhead. It is dated the 22nd day of April, 1976, and addressed to San Pan Trading Corporation, No. 3 Wren

13. That is not Rodriguez' correct title.

> Drive, Woodbury, New York 11797. 'Gentlemen: This is to certify that the 10,000 Bushmaster machine guns that we have ordered from you are for the use of the Armed Forces of our country and will not be re-exported, neither transferred totally or in part, to a third party. God, Union, Liberty. *Signed by Manuel Alfonso Rodriguez, Chief of — there are some initials 'DMGFA.'* " (Tr. 271-272) (Italics added.)

That exhibit was then shown to the jury [Tr. 272]. The prosecutor did not disclose that Government Exhibit 15 was not signed by Manuel Alfonso Rodriguez. The prosecutor did not disclose that Government Exhibit 15 *had been forged by Miguel Celis by tracing the "signature" of Rodriguez thereon.*

Thereafter, the prosecutor elicited testimony from Special Agent Kelly, that a second form of end use certificate was typed up after Mr. Alvarez stated that the first form, Government Exhibit 15, was "not good enough" (Tr. 276), that Mr. Alvarez then dictated a second form to Mr. Suarez, who did the typing, using another of the blank letterheads "signed by Rodriguez", as Celis told Kelly, according to Kelly's testimony (Tr. 253-254). That second form, as typed up, was Government Exhibit 19 (Tr. 277) (Pet. p. 23a). Agent Kelly testified that "Exhibit 19 is the end use certificate with the second paragraph added" (Tr. 277), and was offered and received in evidence without objection! (Tr. 278). The trial court then stated to the jury:

> "The Court: Ladies and Gentlemen, I think that the government may ask you to consider the former end use certificate and this together, and you will see the difference.
>
> Mr. Fiske: What I would like to do Your Honor is show Exhibit 15 as well as . . . 19 . . . to the jury at this time" (Tr. 278, 279).

Thus, Government Exhibits 15 and 19 were tied together, as having been signed by Rodriguez (Tr. 277-279). The prosecutor elicited testimony from Special Agent Kelly that he had a conversation with Cagianese (a named defendant not on trial) wherein he told him "that Colonel Rodriguez was to come to New York on May 15 and at that time we were going to pay *him* (Rodriguez) $75,000 for *his* furnishing us with the *end use certificate*" (Tr. 298-299) (Matter in parenthesis added). (Also, Tr. 300.)

On cross-examination Special Agent Kelly was asked by Mr. Hallinan:

> (Tr. 484) "Q. . . . Government Exhibit 19, when did you first see that form? . . .
>
> A. Are you referring to the blank form or in its completed form?
>
> Q. That is a good distinction. When did you see it as a blank form?
>
> A. May 2, 1976.
>
> Q. Under what circumstances?
>
> A. *Miguel Celis handed* — three original copies of the blank form *signed by according to him, Colonel Rodriguez.*
>
> Q. Now, I am glad you said 'according to him' because *he put it to you on that occasion that the Colonel had signed this document, isn't that correct*? (Tr. 484)
>
> (Tr. 485) A. Yes, sir.
>
> Q. Didn't you learn subsequently that the Colonel had[13a] signed that document?
>
> Mr. Fiske: Your Honor, if Mr. Hallinan is referring to matters which Agent Kelly has learned during the course of the investigation *after the indictment*, then I think Agent Kelly is going to

13a. The trial transcript apparently omitted the word "not". The response of the prosecutor confirms this. Also, see Tr. 584-585.

> have to be permitted to tell everything he learned about the circumstances under which that document was signed. Then we are getting into total hearsay, your Honor, second or third times removed.
>
> The Court: Yes, I know.
>
> Mr. Fiske: This is a matter it seems to me, your Honor, that is capable of direct proof. I might just say, your Honor —
>
> The Court: No, let me think for a moment.
>
> Mr. Fiske: Sure. Mr. Hallinan, would you accept for the time being at least an answer to the question whether he had any personal knowledge as of the time that he received these documents on May — what was it?
>
> The Witness (Special Agent Kelly): The 4th I received the document.
>
> The Court: *Whether Colonel Rodriguez signed the document.* Did you know? (Tr. 485)
>
> (Tr. 486) The Witness (Kelly): *I was told he had signed it.*That is as far as I knew.
>
> The Court: All right.
>
> Mr. Hallinan: Is your Honor finished?
>
> The Court: Sure. Do you want me to go ahead?
>
> Q. *On that date, Agent Kelly, it was put to you by Celis that the Colonel had signed that document, isn't that correct?*
>
> A. *Yes, sir.*
>
> Q. It was blank *when you first saw it?*
>
> A. Other than *the signature*, that is correct.
>
> Q. How many copies were there?
>
> A. Three.
>
> Q. Do you know what happened to those copies?
>
> A. One of them we took, I took. The other two were brought the following day to Mott Haven Truck Parts. I saw them again that morning.

Subsequently, the next day, May 4th, again I saw them filled out, completed.

The Court: When you say 'them' what are you referring to? The one you took?

The Witness (Kelly): There were three copies originally. The one I took I kept and it was never returned. The second copy was the one that was completed. (Tr. 486) (Tr. 487) The third I never saw again. I don't know what happened to it."

The prosecutor had the opportunity to disclose the true facts known to him that Rodriguez had not signed the "certificates", and that Miguel Celis had forged Rodriguez' signature thereon. (Pet. 12a-20a). The prosecutor, knowing the truth, remained silent.

On redirect examination of Special Agent Kelly, the prosecutor again elicited testimony that *Rodriguez* had *signed* the "certificates" (Tr. 570-571):

"Q. You testified on direct examination — and I am not going to ask you about it again — about some conversations (Tr. 570) (Tr. 571) with Mr. Gerlado (sic) and Mr. Celis at that meeting. I would like to ask you whether in addition to statements made by Mr. Geraldo and Mr. Celis anything was said at that meeting by Mr. Michaelson on the subject of Mr. Celis and Mr. Geraldo and Colonel Rodriguez?

A. Mr. Michaelson —

Mr. Lang: Objection.

The Court: No, I will permit it. Go ahead.

A. *Mr. Michaelson told us that the Colonel had signed the certificate for us and that he was a real person and he had verified this himself.*" (Tr. 571).

On re-direct examination of Special Agent Kelly, the

13b. See footnotes 11 and 12b, and 19; supra, pp. 4, 5; Petition 22, 23.

prosecutor deliberately elicited the following:

"Q. Agent Kelly, Mr. Hallinan asked you whether you heard at some time that *Colonel Rodriguez did not sign the document that has been described as the end use certificate, and you answered, yes, is that correct*?

A.That's correct, sir.

Q. Did you hear that at some time after the indictment was filed in this case?

A. Yes, sir.

Q. As a part of the investigation —

The Court: Well, no, he heard it after the (Tr. 584) (Tr. 585) arrest, which I think would be appropriate? Is that correct?

The Witness (Kelly): That is *also* correct, your Honor."

The trial court called a jury recess (Tr. 585). Out of the presence of the jury, the trial court inquired of the prosecutor if he was going into the "post-arrest interview" of Rodriguez. There was a robing room conference (Tr. 586). In the robing room conference the prosecutor turned aside the challenge by the defense to Special Agent Kelly that he, Kelly, had learned that Rodriguez did *not* sign the "certificate dated April 22, 1976." The prosecutor again concealed the true facts that Rodriguez did not sign the "end use certificate" and that Miguel Celis had *forged* Rodriguez' 'signature' thereon (Tr. 586). The prosecutor switched the inquiry into another channel saying that the question that should be put to Kelly is:

"Is it fair to say that when you said you heard that Colonel Rodriguez did not sign the end use certificate *you were referring* to the fact that Colonel Rodriguez *claimed that he did not — said he did not sign the end use certificate.*

Mr. Hallinan: No, I won't agree to that. I think

by his answer he opened up that question. No, No, No. *He heard it from somebody else.* I didn't have in mind the Colonel on that. I *assume* he (Kelly) heard it from Celis himself at some point that the Colonel didn't physically sign this document.

Mr. Fiske: That part of the question is totally improper (Tr. 586) . . .

(Tr. 588) Mr. Hallinan: No. I had in mind Celis, what Celis later told him.

Mr. Fiske: He cannot ask him (Kelly) what he heard.

The Court: I agree with you, but I didn't know that.

Mr. Fiske: It seems to me the fair way to straifhten this out now is to let me put it back to Kelly that when he said — *because this is the only way we can correct the record fairly at this time — is when he said he heard that Colonel Rodriguez had not signed the end* (Tr. 589) *use certificate, he heard thát that is what the Colonel himself said. I think that puts it right in the context —*

Mr. Hallinan: How can the government do that when they know the contrary?

Mr. Lang: Are you sure he didn't know about it before?

Mr. Hallinan: You know the Colonel didn't physically sign that document.

Mr. Lang: Couldn't he have known about that before the arrest?

Mr. Fiske: No.

The Court: From what I understand he didn't.

Mr. Fiske: There is a long story, your Honor, as to how that end use certificate got *signed.*

Mr. Hallinan: The longer the better.

Mr. Fiske: *It is not* to come in through double

> hearsay, through what Gold[14] told Kelly *that Celis or Suarez told him* |*Gold*| *three days ago,* which is what Mr. Hallinan is trying to do." (Tr. 589). (Italics and matter in parenthesis added.)

The prosecutor, instead of disclosing the facts known to him that he knew prior to the return of the indictment that Rodriguez did not sign the end use certificate and that Celis had forged Rodriguez signature thereto, misrepresented to the trial court and defense counsel that Assistant United States Attorney Robert Gold had learned only "*three days ago,*" which would be September 25, 1976), something that "Celis or Suarez told him three days ago" (Tr. 589; 626). In fact, as the record plainly shows, Assistant United States Attorney Robert Gold (and this prosecutor), learned on and prior to May 26, 1976 that Rodriguez *did not sign* the end use certificate and that Celis had *forged* Rodriguez' signature thereto (Pet. 12a-20a).

The prosecutor persisted in misrepresenting to the trial court and defense counsel that Kelly's information that Rodriguez did not sign the end use certificate arose from his learning of Rodriguez' denial in Rodriguez' alleged post-arrest statement (Tr. 590, 593):

> Mr. Fiske: I am perfectly willing to straighten this out by just simply making it clear that his (Kelly's) answer referred to the Colonel's post-arrest statement (Tr. 590) . . . It seems to me with the answer that we have on the record now, the fair thing to do — *and it is true* — is let Agent Kelly say that when he said he heard that the Colonel did not sign the end use certificate, that was referring to the statement that the Colonel had made after his

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14. Assistant United States Attorney Robert Gold, an assistant prosecutor in this case. Tr. 1, September 21, 1976; Pet. 129.

arrest" (Tr. 591; 630-631). (Italics and matter in parenthesis added.)

This was *not true.* The prosecutor deliberately misrepresented to the trial court and defense counsel. The prosecutor continued to conceal the facts known to him that *Miguel Celis had forged Rodriguez' signature onto those three blank sheets of letterhead paper* (Pet. pp. 12a-20a). This misrepresentation is all the more grave because Kelly had testified that he was not present at the so-called Rodriguez post-arrest statement (Tr. 591-592). The prosecutor's response was disingenous: "Somebody told him that the Colonel had denied it." (Tr. 592; also, Tr. 630-631.)

After that sequence, the prosecutor continued to introduce evidence to the jury that *Rodriguez had signed the end use certificate* described in the indictment. The prosecutor referred to the end use certificate (Government Exhibit 31) and asked government witness Timothy Gomez (who was merely the messenger who allegedly delivered the three papers |described at indictment paragraph 11(b) in Court 1| to the State Department for filing) who signed it and had Gomez *read* the exhibit typing and the typed identification there:

> "Q. Was there a signature line on that end user certificate? A. Yes.
>
> Q. . . . Was there a signature on the document? A. Yes.
>
> Q. *Do you recall what that description said?*
>
> A. *Well, I believe it was the Colonel — I don't remember the full name — but a Colonel Rodriguez and I think it had his title there, but I don't recall specifically* (Tr. 609) what it was."[14b]

14b. Gomez had no personal knowledge of the matter of which the prosecutor elicited his testimony. The prosecutor knew that, yet elicited that incompetent and false testimony.

In another robing room conference, the prosecutor repeated the government's persistent and consistent theory and proof in this case that Rodriguez signed the end use certificate dated April 22, 1976, as follows:

> (Tr. 715) ". . . As to the third count, your Honor, the so-called end use certificate, the testimony of Mr. Kelly was that both Mr. Geraldo[15] and Mr. Celis stated on May 2nd, that *Colonel Rodriguez had signed it* — had agreed to provide the end use certificate, and that *he had signed a document in blank*, which was to be filled in with the necessary (Tr. 716) information. Colonel Rodriguez, in his post-arrest statement, denied that he had signed the document:
>
> "I submit, your Honor, if you would look at the specific exhibits, the DSP-83 and the end use certificates, and the other document that was signed in blank, there is a remarkable similarity of the signatures. Notwithstanding that, your Honor, it seems to me there is a degree of *inherent reliability in what* Celis and Geraldo[16] stated that Colonel Rodriguez had agreed to provide the document, otherwise, your Honor, we have a man who has no connection with the government of El Salvador, Mr. Celis, who, by Colonel Rodriguez' post-arrest statement, is described as a friend of his, coming to the United States, *turning over a document* which he knows is going to be found in the United States State Department, *bearing the signature of Colonel Rodriguez*, and it seems to me

15. See footnote 4, supra. Kelly did not testify that Geraldo said that Rodriguez signed those three blank sheets of letterhead paper. Kelly testified that Miguel Celis said that (Tr. 252-254). See also footnotes 11, 12b, and 23. The prosecutor reiterated that false information; supra pp. 4, 5.

16. See footnote 15, supra.

your Honor, that in terms of just *inherent reliability* no one is going to do that. With all the testimony there was at the meeting about what happens when the State Department checks with Colonel Rodriguez, nobody is going to do that (*turning over a document*) unless he is certain that he has the consent and authority of the third highest ranking official in the government (Tr. 717) his friend, to do it." (Tr. 718) (*turning over a document*). (Italics and matter in parenthesis added) (Tr. 718).

The prosecutor declared that the end use certificate was *signed by Rodriguez, and* that Celis' statement to Kelly that *Rodriguez signed the end use certificate* had "inherent reliability" (Tr. 716).

The prosecutor's reference to "*the consent and authority of*" Colonel Rodriguez, was to Celis' "*coming to the United States, turning over a document* bearing the signature of Colonel Rodriguez" (Tr. 716-717). The *consent and authority*" reference in that robing room conference was solely and clearly to Celis' "*coming* to the United States, *turning over* a document bearing the signature of Colonel Rodriguez (Tr. 716-717)." The prosecutor reiterated there that the end use certificate was signed by Rodriguez, that it bore *his signature*. There was not the faintest suggestion to the trial court by the prosecutor of the true facts known to them, *that Miguel Celis had forged Rodriguez' "signature" onto the end use certificate.* (Pet. 12a-20a).

> "Colonel Rodriguez is the man who Mr. Geraldo[17] contacted in El Salvador who agreed to provide the documentation for $75,000 in cash . . ." (Tr. 742) (Tr. 748) . . . You heard Agent Kelly testify . . . (Tr. 749) that Mr. Celis from El Salvador had come up with him and had actually brought

17. See footnote 15.

with him a document bearing the letterhead of Estado Mayor and something else on it that looks to me like a seal, *carrying the signature of Manuel Alfonso Rodriguez*, and that it was up to the people in New York that knew exactly what the State Department needed to fill in the language that would be necessary for the end use certificate . . . That's what Celis said. Michaelson himself said the same thing. (Tr. 750) . . . In any event, on May 4 the documents are completed, the purchase order, *the end use certificate bearing that signature, and the export license, all of* which werfe given to Mr. Gomez who went to Washington . . . filed them (Tr. 750) . . . Agent Kelly had heard separately from Geraldo,[17a] Celis, Alvarez and Tobocman that *Colonel Rodriguez had signed the documentation* . . . (Tr. 752) . . . As to Colonel Rodriguez, the indictment that will be presented to you contained two counts: the conspiracy count and Count 3, which is the count relating to the end use certificate, which is the document which Mr. Celis and Mr. Geraldo[18] brought back from El Salvador prior to the meeting of May 2nd."[19] (Tr. 762).

The prosecutor later, in passing, stated briefly to the jury that:

> (Tr. 764) "As to the substantive count, Count 3, the end use certificate which Mr. Celis and Mr. Geraldo brought up from El Salvador on May 2nd, there is no proof in this case that Colonel

17a. See footnote 15.

18. See footnote 15 (Tr. 252-254).

19. The prosecutor reminded the jury of Kelly's testimony that Miguel Celis said to Kelly that Rodriguez signed all three sheets of letterhead paper in blank (Tr. 252-254).

Rodriguez actually signed that document. We are *not contending* in the absence of that proof that he actually did in fact sign it. I say to you that makes no difference whatsoever. If you find, as I submit you must from this evidence that *that signature* was put on *that document*, however it got on there, with the knowledge, consent and authorization of Colonel Rodriguez, then he is equally responsible as if he had signed it himself. I ask you just to consider for a moment the evidence that supports irrefutably *that conclusion*. You have the statements of Mr. Celis, Mr. Geraldo,[20] Mr. Tobocman, Alvarez and Michaelson[20a] as to Colonel Rodriguez' role in this case long prior to May 2nd, long prior to the time that *that document* was brought up here, long prior to the time *it was filed* with the State Department. Ask yourself one very simple question.

As his Honor will charge you I am sure tomorrow, and if he does not I think all of the lawyers would join me in telling it (Tr. 764) (Tr. 765) to you now, basically deliberations in a jury room comes down to the exercise of common sense. Does it make any sense whatsoever to you that a man like Celis, described by Colonel Rodriguez as his friend, would come to the United States bearing a document,[21] the *signature of Colonel Rodriguez*, knowing as he did that *that document* was going to

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20. Special Agent Kelly gave hearsay testimony of what those persons said to him that Rodriguez signed the end use certificate. None of those persons was a witness at trial.

20a. See footnote 15.

21. Probably a typographical error and probably should read: Does it make any sense whatsoever to you that a man like Celis, described by Colonel Rodriguez as his friend, would come to the United States *with a document bearing the signature of Colonel Rodriguez* . . . . .

be filed with the United States State Department, knowing as he did from the discussions on May 2nd, May 3rd, and May 4th that the State Department might inquire of Colonel Rodriguez, 'What's this all about', and you heard all the testimony as to what they were going to do to be protected in case that happened, does it make any sense in the world to you that a man like Celis would come up here with a name of the Chief of Staff of the Armed Forces of his country on that kind of document unless *he* was satisfied and unless *he* knew that he had the *consent and authorization of Colonel Rodriguez* to do it?"[22] (Tr. 764-765).

The defense counsel for Rodriguez challenged the prosecution in his summations that Rodriguez did not sign the end use certificate (Tr. 806):

> "He (Kelly) has heard that Celis says that Colonel Rodriguez *signed* this end use certificate in blank. Now, you have to listen very carefully to hear how the government handled that in their summation. They are not claiming — did you hear him say it — that the Colonel physically put that name on that document. And I tell you you know certainly that the Colonel *did not sign that document.*" (Italics and matter in parenthesis added)

The defense counsel argued that the prosecutor had shifted the case against Rodriguez "because . . . he conceded on his summation, practically, that there was little proof, real proof, practically conceded that it wasn't the Colonel's signature on the end use certificate . . . I think

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22. "It" refers clearly to the preceding words: "does it make any sense in the world to you that a man like Celis *would come up here*, . . ." with a document bearing the "name" of Rodriguez.

that what you are reduced to is Celis's statement or others' statements to Kelly. It is pure hearsay. There is nothing you can really put your finger on in this record that is solid evidence that ties Colonel Rodriguez—" (Tr. 849). The prosecutor responded that *"I don't think the proof is any different now than it was before"* (Tr. 850). The trial court confirmed that view, stating: "I don't think it is. The same ruling will apply now" (Tr. 850). (Italics and matter in parentheses added). It is clear that the prosecutor continued to claim that Rodriguez had signed the end use certificate (Tr. 850). The prosecutor further confirmed that claim by submitting to the trial court government request to charge number 29. That government request to charge included the following:

> *". . . With respect to Count Three, the statement which the Government contends was made in Government's Exhibit 31, an 'end user' certificate, typed in Spanish and bearing the signature of Manuel Alfonso Rodriguez . . .".*

The trial court granted that government request to charge and made a small modification, to wit: "With respect to Count 3 the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature *which purported to be that* of Manuel Alfonso Rodriguez". (Tr. 894) (Italics added.)

This charge to the jury (Tr. 894) as requested by the government was a clear reiteration by the government of its deliberate, persistent and consistent claim that Rodriguez signed the end use certificate. That charge to the jury, as modified by the trial court, directly presented to the jury for its decision the government's consistent claim that Rodriguez signed the end use certificate. There was no other view of the evidence that the jury could have had. All of the government's evidence and arguments was that

Rodriguez had signed the end use certificate. That was false. The government at all times knew that Miguel Celis had forged Rodriguez' "signature" on the end use certificate by tracing it thereon (Pet. 17-39; 12a-20a; 21a-24a).

POINT II

THE GOVERNMENT WILFULLY CONCEALED AND FAILED TO DISCLOSE ESSENTIAL, CRITICAL MATERIAL EXCULPATORY EVIDENCE.

The government, at page 7, footnote 6, of its brief, stated that:

> Petitioner's claim that the government violated its obligation under Brady v. Maryland, 373 U.S. 83, by not disclosing to the defense that Miguel Celis had forged the signature of Rodriguez' on the end use certificate (Pet. 41) carries little weight, since defense counsel conceded to the district court that he had already been told that Rodriguez' signature had been placed on the document by someone else."

The government's assertion is not correct. It is an out of context, non-sequitur.

It was no secret to defense counsel that *Rodriguez did not sign the end use certificate*, or any of them, because Rodriguez already knew *he did not sign any of those papers*. The critical exculpatory evidence was that *Miguel Celis had forged the signature of Rodriguez onto those three blank sheets of letterhead paper by tracing it thereon.* (Pet. 12a-20a). The defense did not know those facts. The prosecutor however, did know those critical facts (Pet. 12a-20a). The prosecutor not only concealed those facts, but worse, presented argument and evidence to the jury and to

the trial court that *Rodriguez signed those "signatures" on Government Exhibits 11, 15, 19, and 31* (Pet. 21-39), when he knew that was false (Pet. 17-20, 12a-20a, *supra*, Point I.)

The defense could only *guess*, by way of mere *argument* to the jury, that "somebody has to trace or forge" the signature of Rodriguez on the end use certificate (Tr. 806-807). On the other hand, defense would not have had to guess by way of mere argument to the jury, if the prosecutor had carried out his duty to disclose the critical evidence known to him that *Miguel Celis had in fact forged the signature of Rodriguez by tracing it thereon* (Pet. 12a-20a). That evidence would have been available to present to the jury and Rodriguez would have been acquitted. That evidence, if it had been before the jury, would either have precluded the prosecution from presenting the false evidence that it did that Rodriguez had signed the end use certificate, or if the prosecutor persisted in that course, would have thoroughly discredited the prosecutor's false evidence. The result would be that Rodriguez would have been acquitted.

After both sides rested, the trial court, out of the presence of the jury, heard motions by the defense to dismiss the counts of the indictment (Tr. 701-722). Defense counsel argued that the only witness who connected Rodriguez to Count 3, the end use certificate, was Agent Kelly, and that his testimony on that score was what "Celis says, somebody else says, somebody else says, pure hearsay . . . Not one iota of competent direct evidence to tie the Colonel in on a substantive count to the filing of that . . . There is not iota of direct evidence in this case tying the Colonel to that document" (Tr. 707-709). The prosecutor responded to that argument by defense counsel by expressly representing and arguing to the trial court that the evidence showed that *Rodriguez had signed the end use certificate* described in Count 3 (Tr. 715-716):

> "As to the third count, your Honor, the so-called end use certificate, the testimony of Mr. Kelly was

> that both Mr. Geraldo[23] and Mr. Celis stated on May 2nd, that *Colonel Rodriguez signed it* — had agreed to provide the end use certificate, and that he had signed a document in blank, which was to be filled in with the necessary information." (Tr. 715-716). (Italics added)

The prosecutor even noted that Rodriguez had "*denied* that he had signed that document" (Tr. 716). Having said that, however, the prosecutor then argued further that the evidence showed that Rodriguez had signed the end use certificate (Tr. 716-722). The prosecutor argued that the signature which appeared on a DSP-83 form, which defense counsel had stipulated during trial was signed by Rodriguez (Tr. 256-257), when compared to "the end use certificate and the other document that was signed in blank,[24] there is a remarkable similarity." (Tr. 716). The prosecutor argued to the trial court in opposition to defense counsel's motion to dismiss Count 3, that Rodriguez had signed the end use certificate, and that Kelly's testimony that *Celis had told Kelly that Rodriguez had signed those three letterhead sheets of paper in blank* (Tr. 253-254) had "inherent reliability", ". . . it seems to me that there is a degree of inherent reliability in what Celis and Geraldo[25] stated, that Colonel Rodriguez had agreed to provide the document, otherwise your Honor, we have a man who has no conviction with the government of El Salvador, Mr. Celis, who, by Colonel Rodriguez' post-arrest statement, is described as a friend of his, *coming to the United States, turning over a document* which he knows is going to be

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23. See, footnote 11. Kelly did not testify that Geraldo told him that Rodriguez signed the three sheets of letterhead paper in blank. Kelly testified that Miguel Celis told him that Rodriguez had signed the three sheets of letterhead paper in blank (Tr. 253-254).

24. Referring to Government Exhibit 11 (See, Pet. 21a; Tr. 253-254). Also, see footnote 11.

25. See footnotes 11 and 23.

found in the United States State Department, *bearing the signature of Colonel Rodriguez*, and it seems to me, your Honor, that in terms of just inherent reliability no one is going to do that.[26] With all the testimony there was at the meeting about what happens when the State Department checks with Colonel Rodriguez, nobody is going to do that[27] unless he is certain that he has *the consent and authority* of the third ranking official in the governbment, his friend to do it."[28] (Tr. 716-717). The prosecutor continued to argue and assert that Rodriguez *signed* the end use certificate, to wit, "As to Count 3, your Honor, it is a completely different situation and a far stronger one, because *there the document that is the subject is a document with which Colonel Rodriguez himself is directly linked.*" (Tr. 717-718).

The prosecutor thereafter argued and misrepresented to the trial court that Rodriguez' denial that he signed the end use certificate should be disregarded as a false exculpatory statement:

> "It seems to me your Honor is entitled to take his denials with respect to his signature in the context of the other false exculpatory statements that are contained in that document."[29] (Tr. 719)

Rodriguez' defense counsel complained that the prosecutor had said "in chambers, that the government would not claim that the colonel physically signed that, and I don't think they can either argue to your Honor or argue

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26. "That", being "coming to the United States, turning over a document . . . bearing the signature of Colonel Rodriguez."

27 & 28. "It", being "coming to the United States, turning over a document . . . bearing the signature of Colonel Rodriguez."

29. Referring to the alleged Rodriguez post-arrest statement.

to this jury in good conscience the similarity of signature."[30]

The prosecutor showed that, in his mind, through his semantic exercises, his words that "our claim that the signature was put on the document with Colonel Rodriguez' full consent, knowledge and authority" (Tr. 255, 720) meant that *Rodriguez signed the end use certificate*. The prosecutor had made this same representation, this same "claim", at the September 24, 1976 robing room conference on the fourth day of the trial, which was the second day of Kelly's direct examination (Tr. 255). (*Supra*, 1-7).

The prosecutor further evidenced that those words, ". . . full consent, knowledge and authority" meant to him (the prosecutor), that *Rodriguez signed the end use certificate* by the following:

> "Mr. Fiske: Yes, but our *claim*, your Honor, is that the *comparability of the signatures is a relevant fact in determining whether that signature was put on there with the knowledge, consent and authority of Colonel Rodriguez*. It is part of the same argument we are making when we say that Celis, who was his friend, would not *come* to the United States and *turn over a document* which was going to be filed with the State Department, leading to an inquiry to Colonel Rodriguez, unless he had the knowledge, consent and authority of Colonel Rodriguez to do it."[31] (Tr. 720-721). That the prosecutor continued to *claim* that *Rodriguez signed the end use certificate* is further evidenced

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30. See, Tr. 256-257, 315-316, re DSP-83 form. The prosecutor was arguing that the stipulated signature of Rodriguez had a remarkable similarity to the end use certificate signature (Government Exhibit 31) thus both were signed by Rodriguez.

31. "It", being, as in footnotes 27, 28, to *come* to the United States and *turn over* a document. See also footnote 30.

by the prosecutor's submission to the trial court of the request to charge number 29 (Tr. 727), that *Rodriguez signed the end use certificate*, to wit:

> "With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish *and bearing the signature of Manuel Alfonso Rodriguez.*"

The trial court ruled that government's request to charge number 29 was "substantially granted" (Tr. 727) (See tr. 894). Apparently, in view of the evidence in the record, in the form of the alleged Rodriguez post-arrest statement wherein Rodriguez had denied that he signed the end use certificate (Tr. 256-257, 315, 316), the trial court modified government request to charge number 29 to be as follows: "With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature *which purported to be that of Manuel Alfonso Rodriguez*" (Tr. 894). The government plainly continued to *claim* that *Rodriguez signed the end use certificate.* The jury was directly presented with the question for their determination whether Rodriquez signed the end use certificate as "claimed" by the prosecutor, or did not sign the end use certificate. There was no other question before the jury.

The prosecutor at all times knew that Rodriguez did not sign the end use certificate (Pet. 12a-21a). The prosecutor at all times knew that *Miguel Celis had forged Rodriguez' aignature on the end use certificate* (Pet. 12a-21). But the prosecutor concealed this critical decisive evidence from everyone. Worse, the prosecutor continued to represent and argue to the jury and the trial court that *Rodriguez signed the end use certificate.*

In his closing argument to the jury, the prosecutor continued to argue his claim that *Rodriguez signed the end*

use certificate. (Tr. 741, 742, 748-749, 752). The prosecutor reviewed the government's evidence that Rodriguez had signed the end use certificate in blank (Tr. 741-742, 748-749, 752). The prosecutor argued to the jury:

> (Tr. 741) "Basically what this whole case is about, . . . was to file false documents with the State Department in order to get a false export license . . . The key to the whole scheme, the key to the whole concept of obtaining a false export license, was the paying of the end use certificate . . . a false statement by a high official of a foreign government (Tr. 742) that his government in fact was buying the guns . . . *Colonel Rodriguez is the man . . . who agreed to provide the documentation* . . . (Tr. 742) . . . (Tr. 748) On May 2nd . . . Mr. Geraldo[31a] came back to the United States on May 2nd and at a meeting that you heard Agent Kelly testify[32] about he told Agent Kelly and the others that he had obtained Colonel Manuel Rodriguez, Chief of Staff of the Armed Forces of El Salvador who had agreed to provide the end use certificate. (Tr. 749). He[33] further said that Mr. Celis from El Salvador had come up with him and had actually brought with him a document bearing the letterhead of Estado Mayor and something else on it that looks to me like a seal, *carrying the signature of Manuel Alfonso Rodriguez*, and that it was up to the people in New York that knew exactly what the State Department needed to fill in the language that would be necessary for the end

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31a. See footnote 15c.

32 & 33. See footnotes 11, 15, 23.

use certificate. That's what Geraldo[34] said, that's what Celis said.[35] Michaelson himself said the same thing.[36] . . . On May 3rd and May 4th you heard the testimony about what happened with the preparation of the documents, Alvarez actually dictating the language of the end use certificate, Exhibit 31, to Geraldo, Geraldo writing it down in Spanish, taking it over to Wittington where it was typed up, wrongly, as you heard the next day, they had to add another paragraph, you heard the argument between Alvarez and Geraldo about why the documents had been prepared wrong (Tr. 750). In any event, on May 4th the documents are completed, the purchase order, *the end use certificate bearing that signature* and the export license, all of which were given to Mr. Gomez who went to Washington . . . This, you may recall, the call was made because there was a question about when and how Colonel Rodriguez pay the $75,000 that Geraldo and Celis and Michaelson *said*[37] that he demanded in return for providing *this* documentation . . . (Tr. 750) . . . Agent Kelly heard separately from Geraldo, Celis, Alvarez and Tobocman that *Rodriguez had signed the documentation* (Tr. 752) . . . As to Colonel Rodriguez, the indictment that will be presented to you contained two counts: The conspiracy count and Count 3, which is the count relating to the end use certificate which is the document which Mr.

34, 35 & 36: The reference is to what Kelly testified that these persons read to him. As set forth in footnotes 11 and 23, Kelly did not testify that Geraldo said to him that Rodriguez signed the three sheets of letterhead paper in blank which Celis produced for Kelly on May 2, 1976 (Tr. 253-254).

37. See footnotes 34, 35, 36, 11, 23.

Celis[38] and Mr. Geraldo[37a] brought back from El Salvador prior to the meeting of May 2nd. (Tr. 762)

After the prosecutor had thus repeatedly, aggressively, persistently and consistently represented, claimed, argued, and presented evidence that *Rodriguez signed the end use certificate*, the prosecutor came up with a single, isolated, ambiguous, contradictory and utterly odd bit of semantics that:

> "As to the substantive Count 3, the end use certificate *which Mr. Celis* and Mr. Geraldo[38] *brought up from* El Salvador on May 2nd,[39] *there is no proof in this case that Colonel Rodriguez actually signed that document. We are not contending in the absence of that proof that he actually did in fact sign it. I say to you it makes no difference. If you find, as I submit you must, that that signature was put on that document, however it got on there, with the knowledge, consent and authorization of Colonel Rodriguez, then he is equally responsible as if he had signed it himself.*[39a] I ask you to consider for a moment the evidence that supports irrefutably that conclusion.[40] You have the statements of Mr. Celis.

37a. See footnote 15.

38 & 39. See footnotes 11, 23, 34, 35 and 36.

39a. See footnote 9; also p. 6 supra.

40. *All* of the government "evidence" was that *Rodriguez signed the end use certificate*. There is not a scintilla of evidence that anyone else signed the end use certificate. Kelly testified that on May 2, 1976, he met with Miguel Celis in a restaurant in Westchester County, that Celis produced three blank sheets of letterhead paper signed with a signature which Celis stated to Kelly was signed by Rodriguez. (Tr. 252-254; Point 1☐ Pet. 17-39).

There was absolutely no evidence which would present any issue, in any form, that someone else, not Rodriguez, signed the end use certificate; there was absolutely no evidence therefore, from which the government might

Mr. Geraldo, Mr. Tobocman, Alvarez, and Michaelson as to Colonel Rodriguez' role in this case long prior to May 2nd, long prior to the time that *that* document was brought up here, long prior to the time that it was filed with the State Department.[41] (Tr. 764).

The prosecutor's subsequent statements in that summation showed that he meant that *Rodriguez signed the end use certificate, and said so:*

"Does it make any sense whatsoever to you that a man like Celis, . . . would come to the United States bearing a document, the *signature of Colonel Rodriguez*, knowing as he did that that document was going to be filed with the United States State Department, knowing as he did from the discussions on May 2nd, May 3rd and May 4th that the State Department might inquire of Colonel Rodriguez, 'What's this all about', and you heard all the testimony as to what they were going to fo to be protected in case that happened, does it make any sense in the world to you that a man like Celis would come up hwere 'with a name of the Chief of Staff of the Armed Forces of his country on that kind of a document[42] unless he was

construe these odd and starkly out of place statements of the prosecutor, as a statement by the prosecutor that *Rodriguez did not sign the end use certificate.* These words are similar to the words stated by this prosecut' 'n a robing room conference. (See footnote 9 and 39a) which are set forth above, which show that the prosecutor was saying that *Rodriguez signed the end use certificate.*

41. See, footnotes 11, 23, 34, 35, 36. None of those persons named testified at trial. Kelly testified that they said certain things—all hearsay. The prosecutor is reiterating that which he had consistently presented to the jury and the trial court that Rodriguez had signed the end use certificates, in all of their forms. (See Pet. 21a-24a).

42. "That document" that had the name—the "signature" of Rodriguez on it was three blank sheets of letterhead paper produced on May 2, 1976 by Miguel Celis to Special Agent Kelly (Tr. 253-254).

satisfied and unless he knew that he had the consent and authorization of Colonel Rodriguez to do it?"[43] (Tr. 765).

CONCLUSION

THE PETITION SHOULD BE GRANTED.

The petition presents clear proof of grave violations of petitioner's constitutional rights by the knowing use of false material evidence by the government and by the concealment and failure to disclose by the government that Miguel Celis had forged Rodriguez' "signature" on the end use certificate by tracing it thereon, in addition to other stated grounds set forth in the petition.

The petition should be granted.

Respectfully submitted,

/s/ Bernard G. Ehrlich
BERNARD G. EHRLICH

Of Counsel:
Charles Sutton

Dated: February 10, 1978
New York, New York

43. "It", refers to Celis 'coming to the United States Court *bearing a document having the signature of Colonel Rodriguez.*' (Tr. 765) See also, footnotes 27, 28, 31.